9127
89

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. [redacted]207.

THE GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

FILED JANUARY 19, 1907.

(20,540.)

(20,540.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 575.

THE GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

INDEX.

	Original.	Print.
Transcript from the district court of Travis county	*a*	1
Caption	*a*	1
Plaintiff's original petition	1	1
Defendants' plea in abatement	11	7
Defendants' original answer	13	8
Exhibit A—Railroad tax statement	56	30
Exhibit B—Statement of valuation	64	35
Plaintiff's first supplemental petition	67	37
Judgment	68	38
Conclusions of law	71	40
Statement of facts	79	44
Plaintiff's evidence	79	44
Report of defendant G., H. & S. A. Ry. Co. to comptroller	79	44
Assessment by comptroller	81	45
Certificate of comptroller upon report	82	46
Request by comptroller to attorney general to sue	83	46
Report of N. Y., T. & M. Ry. Co.	85	47
Copy of assessment	87	48
Certificate of comptroller	88	49
Request by comptroller to attorney general to sue	89	49
Report of G., W. T. & P. Ry. Co.	90	50
Copy of assessment	92	51

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1907.

	Original.	Print.
Certificate of comptroller upon report	93	52
Request by comptroller to attorney general to sue	94	52
Report of G., H. & N. Ry. Co.	96	53
Assessment by comptroller	98	54
Certificate of comptroller upon report	99	55
Request by comptroller to attorney general to sue	100	55
State offers copies of minutes of boards of directors of T. & P. Ry. Co. and part of answer of T. & P.	102	56
Admission of non-payment of taxes	102	56
Defendants' evidence	104	57
Agreement of parties	104	57
Affidavits of C. C. Barry, C. C. Gibbs, M. A. Westcott, C. R. Cottingham, L. J. Cox, John E. O'Neil, and C. K. Dunlap	112	62
Testimony of A. A. Van Alstyne	123	68
Receipts from treasurer to D., B. & N. O. Ry. Co.	125	68
Letter from treasurer to Bolinger	126	69
Letter from treasurer to Boof	126	70
Showing as to postponement of this case	127	70
Testimony of A. Fonda	128	70
Articles of incorporation of T. & P. Ry. Co.	147	82
Acts of Congress of March 3, 1871, and June 22, 1874	150	83
Special act of legislature of Texas	151	84
Special act of legislature of Texas, November 12, 1871	159	88
Conveyance from Southern Pacific Ry. to T. & P. Ry.	164	91
Conveyance from Southern Transcontinental to T. & P. Ry.	166	92
Act of legislatnre of Texas	169	93
Testimony of T. J. Freeman	181	100
Testimony of W. H. Abrams	185	102
Defendant offers last official map of R. R. Commission	187	103
Statement showing gross receipts and distributions	187	104
State's evidence in rebuttal	193	108
Testimony of E. Von Rosenberg	193	108
H. G. Askew	194	109
Allison Mayfield	207	116
Letters from Mayfield to Stubbs	213	118
Agreement as to defendants' agents having knowledge of decision in Paris and G. N. case	213	119
Portions of report of Southern Pacific Ry. Co.	215	120
Agreement of counsel and approval of court to statement of facts	219	121
Assignments of error	220	122
Supersedeas bond of G., H. & S. A. Ry. Co.	244	136
G., H. & N. Ry. Co.	247	138
N. Y., T. & M. Ry. Co.	250	140
G., W. T. & P. Ry. Co.	254	142
Cross-assignments of error	258	144
Bill of costs	263	147
Certificate of clerk district court	264	147
Proceedings in court of civil appeals	266	148
Opinion	266	148
Opinion in G., H. & S. A. Ry. Co. *vs.* State	331	183
Judgment	334	184

	Original.	Print.
Motion for rehearing by appellee	335	185
Opinion on motion for rehearing	345	191
Order overruling motion for rehearing	350	193
Proceedings in supreme court of Texas	350	194
Petition for writ of error	350	194
Exhibit A—Assignment of errors	426	235
Order granting application for writ of error	430	238
Citation to defendants in error	430	238
Order of submission	432	239
Opinion	432	239
Judgment	458	253
Motion of defendants in error for rehearing	460	254
Motion of plaintiff in error for rehearing	496	274
Order overruling motion of defendants in error for rehearing	510	283
Order overruling motion of plaintiff in error for rehearing	510	284
Petition for writ of error	511	284
Bond on writ of error	514	286
Writ of error (original)	517	288
Citation in error (original)	519	289
Assignments in error	521	290
Certificate of clerk of supreme court of Texas	530	296

a *Caption.*

THE STATE OF TEXAS, *County of Travis:*

At a term of the District Court of the 26th. Judicial District of Texas, begun and holden at Austin, within and for the County of Travis, before the Hon. V. L. Brooks, and ending on the 16th. day of December, A. D. 1905, the following cause came on for trial, to-wit:—

No. 23358.

THE STATE OF TEXAS
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL.

Plaintiff's Original Petition.

Filed November 24, 1905.

1 In District Court of Travis County, 26th Judicial District of Texas.

THE STATE OF TEXAS, *County of Travis:*

To the Honorable Judge of said Court:

Your petitioner, the State of Texas, suing herein by her Attorney General, and hereinafter called plaintiff, complaining of the Galveston, Harrisburg and San Antonio Railway Company, and of the New York, Texas and Mexican Railway Company and of the Gulf, Western Texas and Pacific Railway Company, and of the Galveston, Houston and Northern Railway Company, hereinafter called defendants, respectfully shows to the Court:—

1.

That each of said defendants is a railroad corporation duly incorporated under the laws of the State of Texas, and has an officer, to-wit, its General Manager, W. G. Van Vleck, who resides in the City of Houston, County of Harris, in said State, upon whom process to each of said defendants may be served.

2.

That in its corporate capacity, afora*s*aid, defendant, Galveston, Harrisburg and San Antonio Railway Company has continuously since prior to the 30th. day of June, 1904, owned, operated, managed, and controlled, and now owns, operates, manages and controls a line of railroad lying wholly within the State of Texas, for the transportation of passengers, freight and baggage; and has ever since the respective dates of the hereinafter alleged purchases by it

of the said railroads of its co-defendants, aforesaid, operated, managed and controlled the several lines of railroad so purchased by it.

2 That the defendant, New York, Texas and Mexican Railway Company, and the defendant, Gulf, Western Texas & Pacific Railway Company, each in its corporate capacity, aforesaid, did continuously from a date prior to June 30th. 1904, down to the — day of August, 1905, own, operate, manage and control a line of railroad lying wholly within the State of Texas, for the transportation of passengers, freight and baggage.

That the defendant, Galveston, Houston & Northern Railway Company, in its corporate capacity, aforesaid, did continuously from a date prior to June 30th., 1905 down to the — day of —— 1905, own, operate, manage and control a line of railroad wholly within the States of Texas, for the transportation of passengers, freight and baggage.

That on the — day of August, 1905, said Galveston, Harrisburg & San Antonio Railway Company, under and by virtue of a Special Law of the Twenty-ninth Legislature, of the State of Texas, entitled:

"An Act to authorize the Galveston, Harrisburg & San Antonio Railway Company to purchase, own and operate the railroads of the New York, Texas & Mexican Railway Company, with the franchises and other property thereunto appertaining; the railroads of the Gulf, Western Texas & Pacific Railway Company, with the franchises and other property thereunto appertaining; the railroads of the Gonzales Branch Railroad, with the franchises and other property thereunto appertaining; the railroads of the Galveston, Houston & Northern Railway Company with the franchises

3 and other property thereunto appertaining; and the railroad of the San Antonio & Gulf Railroad, with the franchises and other property thereunto appertaining, or either, or any of such railroads, with its or their franchises and appurtenances; and to authorize the owners of such of said railroads, or its or their franchises and appurtenances to sell the same; to authorize the Galveston, Harrisburg & San Antonio Railway Company, to construct, own, operate and maintain, or to amend its charter so as to authorize it to construct, own, operate and maintain a railroad from a connection with the present terminus of the San Antonio & Gulf Railroad, at or near Stockdale, to the town of Cuero in DeWitt County; and to authorize the Galveston, Harrisburg and San Antonio Railway Company to issue additional mortgage bonds to the amount of the value of the railroads, franchises and appurtenances so purchased of such of them as shall be purchased, and to the amount of the value of the railroad hereafter constructed by it under the provisions of this Act, as fixed, or as the same may be fixed by the Railroad Commission of Texas, and to regulate the reports of the operations of such properties."

which was approved May 3rd., 1905, to which Act, as the same appears in Chapter 58, pages 502-3-4-5 & 6, of the Special Laws of the Twenty-ninth Legislature of the State of Texas reference is so

made with the prayer that same be considered as a part of this petition as fully and specifically as though same were herein set out at length, purchased and acquired the railroads with franchises and property thereunto appertaining of its co-defendants, the New York, Texas & Mexican Railway Company and the Gulf,
4 Western Texas & Pacific Railway Company, respectively as described and defined in said Act, and under and by virtue of the terms and provisions of said Act, did likewise on the —— day of ——, 1905, purchase and acquire the railroad with its franchises and property thereunto, appertaining of its co-defendant, the Galveston, Houston & Northern Railway Company, as described and defined in said Act; and, that under the terms and provisions of said Act, which have been accepted by said Galveston, Harrisburg & San Antonio Railway Company, and are binding upon it, all of the properties so acquired by it from its said co-defendants, respectively, are bound and liable for all debts, charges, and claims, etc., against said co-defendants, respectively, and the railroad franchises and properties of each of said co-defendants in the hands of said Galveston, Harrisburg & San Antonio Railway Company are chargeable with all debts, claims and charges of every kind whatsoever existing against each of said companies, respectively, at the time of its acquisition, as aforesaid, by said Galveston, Harrisburg & San Antonio Railway Company, and the taxes, penalties and forfeitures sued for herein are charges upon said purchased properties in the hands of said Galveston, Harrisburg & San Antonio Railway Company, all as hereinafter set forth.

3.

That the gross receipts of said defendants, respectively, from every source whatsoever, for the year ending on the 30th. day of June, 1905, were as follows, viz:—

The Galveston, Harrisburg & San Antonio Railway Com-
5 pany $7,472,458.47;

The New York, Texas & Mexican Railway Company, $509,458.17;

The Gulf, Western Texas & Pacific Railway Company, $155,-511.01; and the

Galveston, Houston & Northern Railway Company, $1,248,117.47.

4.

That on, to-wit, the 26th. day of September, 1905, each of said defendants acting by and through its first Vice President, Thornwell Fay, duly made under oath a report in writing to John W. Stephens, Comptroller of Public Accounts of the State of Texas, showing as required by the statute hereinafter mentioned, the gross receipts of such line of railroad from every source whatsoever, for the year ending on the 30th. day of June, 1905, the amount of gross receipts in each instance as shown by said reports, respectively, being the respective amounts hereinbefore alleged to have been the gross receipts of said defendants, respectively, for the year ending on the 30th day of June, 1905.

That on the 29th. day of September, 1905 each of said reports was duly filed in the office of the said Comptroller of Public Accounts; and subsequently, on that day, said report of the Galveston, Harrisburg & San Antonio Railway Company was accepted and approved by said Comptroller of Public Accounts, and he thereupon, on that day calculated, estimated and assessed at the sum of $74,724.50, the tax to be paid by said company for the year 1905, under the terms and provisions of Chapter 141, Acts of the Twenty-ninth Legislature of the State of Texas, approved April 17th., 1905, which
6 said sum and tax was equal to one per centum of the gross receipts of that company from all sources whatsoever, for the year ending on the 30th. day of June, 1905.

That on said 29th. day of September, 1905, said report of said New York, Texas & Mexican Railway Company was accepted and approved by said Comptroller of Public Accounts and that upon consideration by him of said report he thereupon, and on that day calculated, estimated and assessed at the *the* sum of $5,094.58 the tax to be paid to plaintiff by said Company, for the year 1905, under the terms and provisions of said statute, which said sum and tax was equal to one per centum of the gross receipts of said company from all *cources* whatsoever, for the year ending on the 30th day of June, 1905.

That on, to-wit, the 30th. day of September, 1905, said report of said Gulf, Western Texas & Pacific Railway Company was accepted and approved by said Comptroller of Public Accounts, and that upon consideration by him of said report, he thereupon on that day calculated, estimated and assessed at the sum of $1555.11 the tax to be paid to plaintiff by said Company, for the year 1905, under the terms and provisions of said statute, which sum and tax was equal to one per centum of the gross receipts of said company from all sources whatsoever, for the year ending on the 30th. day of June, 1905.

That on the 29th. day of September, 1905, said report of said Galveston, Houston & Northern Railway Company was accepted and approved by said Comptroller of Public Accounts, and that upon consideration by him of said reports, he thereupon, on that
7 date, calculated, estimated and assessed at the sum of $12,481.17 the tax to be paid to plaintiff by said Company for the year 1905, under the terms and provisions of said statute which sum and tax was equal to one per centum of the gross receipts of said Company from all sources whatsoever for the year ending on the 30th. day of June, 1905.

5.

That under said statute, the said several amounts of said taxes of said defendants, respectively, as above shown, for the year 1905, became and were due and payable to plaintiff, through her State Treasurer, in Travis County, Texas on October 1st. 1905; that by reason of the premises defendants severally and as above shown, respectively, became liable to pay to plaintiff in the County of Travis, on the first day of October, 1905, as such annual tax for the year 1905, the said several sums of money, same being several amounts

of taxes aforesaid of said defendants, respectively; but to pay the same respectively, or any part thereof, as by said statute required, said defendants have severally wholly failed and refused and still fail and refuse, to plaintiff's great damage.

6.

That said statute provides in substance and effect, among other things that should any annual tax prescribed by or mentioned in said statute, or by it required to be paid, be not paid to the State Treasurer of the State of Texas, on or before the 1st. day of October of any year a penalty of ten per centum upon the amount of such tax shall accrue thereon and be added thereto, and in case said tax and penalty thereon be not paid on or before the 1st. day of
8 November, thereafter, the railroad corporation, or receiver thereof, or either such person, firm or association of persons so liable for such tax and penalty, under said statute, shall forfeit and pay to the State of Texas the sum of Two Hundred ($200) dollars for each day such payment may be delayed after the first of November of that year.

That by reason of said failure and refusal of defendants, respectively, to pay the said several amounts of said tax, so due and owing by said defendants, respectively, when same became due and payable, as aforesaid, and as by said statute required, a penalty of ten per centum upon the said several amounts of said taxes accrued thereon, and was added thereto, respectively, by operation of said statute; whereby said defendants thereupon, respectively became liable to pay to plaintiff, as aforesaid, as penalties for said failure and refusal of defendants, respectively, to pay said several amounts of said taxes, respectively, an additional sum of ten per centum upon said several amounts of said taxes, respectively, but to pay the said several sums of said taxes, respectively, and to pay the said several amounts of said taxes and penalties, respectively though often requested so to do, each of said defendants has hitherto wholly refused and failed and still refuses and fails to plaintiff's damage in the cases and in the amounts below shown, viz:—

Galveston, Harrisburg & San Antonio Railway Company, $85,000.00;

New York, Texas & Mexican Railway Company, $6000.00;
9 Gulf, Western Texas & Pacific Railway Company, $2500.00; and,

Galveston, Houston & Northern Railway Company, $15,000.00.

7.

That by reason of the premises and said failure and refusal of said defendants, respectively, to pay to plaintiff on or before the 1st. day of November 1905, the said several amounts of said taxes, and the ten per centum, penalties, aforesaid, respectively, as hereinbefore set forth, each of said defendants has forfeited and become liable to pay to plaintiff, in Travis County, Texas, the sum of Two Hundred ($200) Dollars for each and every day since November 1st., 1905, down to and including the day on which this petition is filed,

which forfeitures of said defendants aggregate the sum of $4500.00 and in like manner and by reason of the premises and of the continued failure of defendants, respectively, to pay said several amounts of said taxes, and ten per cent. penalties, aforesaid, (if said defendants shall respectively so persist in not paying such said tax and penalty so due and owing by it), each of said defendants will by operation of said statute likewise forfeit and become liable to pay to plaintiff an additional sum of Two Hundred ($200.00) Dollars for each and every day after the filing of this petition until said several amounts of said taxes and said ten per centum penalties shall be paid to plaintiff: All to plaintiff's great damage.

8.

That on, to-wit, the 14th. day of November, 1905, the said Comptroller of Public Accounts, in the exercise of a power and discretion conferred upon him by said statute, did, in writing, request the Attorney General, aforesaid, to bring suit in the name of the State of Texas, in Travis County, against the proper parties defendant to recover all taxes, penalties and forfeitures mentioned in said chapter 141 of the Acts of the 29th. Legislature aforesaid, and particularly against said above named defendants, respectively, to recover, respectively, the several amounts of taxes, penalties and forfeitures, respectively, herein sued for; and this suit is brought pursuant to, and under and by virtue of said request.

9.

Plaintiff therefore prays for process to each of said defendants in terms of law and that on final hearing hereof plaintiff have judgment against said defendants, respectively, for the several amounts of taxes and ten per centum penalties, aforesaid, so due and owing by said defendants, respectively, and for the aggregate amounts of said forfeitures, for which said defendants, respectively, have severally become, and are liable down to and including the day of the filing of this petition, and for the aggregate amount of such forfeitures, if any, for which said defendants may respectively be and become liable in the premises from the date of the filing of this petition down to and including date of final judgment in this cause, and for costs of suit, and for full relief, general and special.

R. V. DAVIDSON,
Attorney General,
W. E. HAWKINS,
Assistant Attorney General,
For the State of Texas, Plaintiff.

(Endorsed:) No. 23358. The State of Texas *vs.* Galveston, Harrisburg, & San Antonio Ry. Co. *et al.* Plaintiff's original petition. Filed in Dist. Court Travis County, 26th. Judicial Dist. of Texas, Nov. 24, 1905. Jas. P. Hart, Clerk, By E. Huppertz, Deputy.

Defendants' Plea in Abatement.

Filed November 28, 1905.

In District Court, Twenty-sixth Judicial District.

No. 23358.

STATE OF TEXAS
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RY. CO. ET AL.

Herein come defendants in the above entitled and numbered cause and show to the court that this is an action brought by Robert V. Davidson, Attorney General of the State of Texas, for taxes and penalties due under an Act. of the Twenty-ninth Legislature of the State of Texas, approved April 17, 1905, seeking to impose a tax of one per cent. upon the gross receipts of defendant and providing for penalties for the non-payment thereof, for which see Chapter 141, Gen. Laws of the State of Texas, 336. That under the constitution and laws of the State of Texas said Robert Vance Davidson, Attorney General as aforesaid, is without power or authority to file or prosecute said suit. That said power is lodged under the Constitution and laws of the State of Texas either with the County Attorney of Travis County or with the District Attorney thereof, and that the said Attorney General has not been authorized or directed to bring or prosecute this action either by the County Attorney or by the District Attorney of said county, and the same is not now being prosecuted at the request or under the
12 authority or direction of either of the officers aforesaid.

Wherefore defendants say that the said Attorney General of the State of Texas is without authority to bring or prosecute this action and defendant prays the court that the same be abated.

BAKER, BOTTS, PARKER & GARWOOD,
Attorneys for Defendants.

I, H. M. Garwood, state on oath that I am the attorney of defendants in the above entitled and numbered cause, and that the matters and things set forth in the foregoing plea in abatement are true.

H. M. GARWOOD.

Sworn to and subscribed before me this the 22nd. day of November, A. D. 1905.

[SEAL.]

E. GRAY,
Notary Public, Harris County, Texas.

(Endorsed:) No. 23358. State of Texas *vs.* G. H. & S. A. Ry. Co. *et al.* Plea in abatement Filed Nov. 28, 1905, Jas. P. Hart, Clerk.

13 *Defendants' Original Answer.*

Filed November 28, 1905.

In District Court of Travis County, Twenty-sixth Judicial District.

No. 23358.

STATE OF TEXAS
vs.
G., H. & S. A. RY. CO. ET AL.

Now come the defendants in the above entitled and numbered cause and file this their original Answer herein and say:

I.

Not waiving, but insisting upon plea in abatement heretofore filed herein and exception to the ruling of the court, should the same be overruled, file this their exception in abatement and show to the Court that it appears from the face of plaintiff's petition that this action has been brought and is now being prosecuted by an officer of the State of Texas, who is wholly without authority of law to bring or prosecute the same, and of this its exception in abatement defendant asks judgment of the court that this cause be hence dismissed.

II.

Should the foregoing plea in abatement and exception in abatement be overruled, defendant demurs generally to plaintiff's petition herein and says the same is wholly insufficient in law, and of this its general demurrer, defendant asks judgment of the Court.

14 III.

For special exception thereto, defendant says:—

(1) That it appears upon the face of plaintiff's petition that this suit has been filed and is being prosecuted without authority of law by the officer bringing the same.

(2) Said Act of the Legislature is said petition referred to is unconstitutional and void, for that the same is in conflict with and in contravention of the third paragraph of section eight, article one of the Constitution of the United States, which provides, "that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian Tribes," in this, that said act seeks to levy and does levy a tax directly upon defendant's receipts from inter-state and foreign commerce and regulates, obstructs and hinders commerce between the several states and with foreign nations.

(3) That said Act is violative of and in contravention of section one of the fourteenth amendment to the Constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any

person within its jurisdiction the equal protection of the laws, in this, that said act provides that the taxes therein levied shall be in addition to all other taxes now levied by the law, and the court being judicially informed that the property of this defendant has been and is now assessed for taxation upon and ad valorem basis and rate as all other citizens of the State of Texas, to now levy upon it an additional tax of one per cent. upon its gross receipts, when a like tax is not levied on other citizens of said state is an unequal,
15 unjust and arbitrary discrimination in taxation against this defendant, contrary to said section one, article fourteen of the amendments to the Constitution of the United States.

(4) Said Act of the Legislature is contrary to and in violation of section one, article eight of the Constitution of the State of Texas, which provides that taxation shall be equal and uniform and all property in this State, whether owned by natural persons or corporations other than municipal, shall be taxed in proportion to its value, which shall be ascertained as provided by law.

(5) That said act is in violation of that provision of section one, article eight of the Constitution of Texas, which authorizes the Legislature to tax incomes of both natural persons and corporations other than municipal, because said act does not levy or purport to levy, the other statutes of the State of Texas do not levy or purport to levy an equal and uniform tax on the incomes of both natural persons and corporations other than municipal, or upon the gross receipts of both natural persons and corporations other than municipal.

(6) Said Act is in contravention of section eleven, article eight of the Constitution of the State of Texas, which provides that all property whether owned by persons or corporations shall be assessed for taxation and the tax paid in the county where situated.

(7) Said act is in contravention of section one of the fourteenth amendment to the Constitution of the United States, providing that no state shall deny to any person within its jurisdiction the equal protection of the law, in this, that this defendant and other railroad companies are selected from among the masses of persons
16 and property in the state and certain taxes are imposed upon it, which are not imposed upon other persons and property in the State and the reports of certain persons, officers and agents required by said act are given the effect of an absolute assessment of said property for taxation, whereas under the laws of said State of Texas, no tax of the same or similar nature is imposed upon other persons and corporations and the value of the property of all other persons and corporations is assessed in proportion to its value and not at an absolute, fixed and mathmetical sum, to be arbitrarily determined by a single officer, to-wit, the Comptroller of the State of Texas.

(8) That said Act is contrary to the provisions of section eight of article eight of the Constitution of the State of Texas, which provides that all property of railroad companies shall be assessed and the tax collected in the several counties in which said property is situated, including so much of the road bed and fixtures as shall

be in each county, and that the rolling stock may be assessed in gross where the principal office of the Company is located.

(9) That said Act is contrary to sections eleven, fourteen, fifteen, sixteen and eighteen of the Constitution of the State of Texas, in this, that it provides that the Comptroller shall levy and assess a tax of one per cent. on defendants' gross receipts, whereas it is provided in said section eleven of article eight, that all property shall be assessed for taxation and the tax paid in the county where situated, and in section fourteen that there shall be elected by the qualified electors of the county an assessor, who, as provided in section fifteen,
17 shall assess said property for taxation, and section eighteen thereof providing that the Commissioner's Court of each county shall constitute a board of equalization for the purpose of equalizing as near as may be the value of all property rendered for taxation, said bill depriving the county assessors of their constitutional right to assess and equalize defendant's property and conferring the same upon the Comptroller of the State and depriving defendant of its constitutional right to have said property assessed and equalized by said county assessors and boards of equalization in the several counties where situated. That said act is contrary to section one, article eight of the constitution of the State of Texas, in that it imposes a double taxation upon defendant in this, that defendant under and by virtue of the provision of the act of March 1, 1905, for which see Chapter 19 of the General Laws of the Twenty Ninth Legislature, P. 21, is compelled to pay and has paid a tax upon its franchises, as measured by the amount of its capital stock.

(10) That said act is contrary to section one, article eight of the Constitution of the State of Texas, in that it provides for and compels, double, unequal and ununiform taxation by imposing a tax of one per cent. upon its gross passenger revenues, earned within the state, for the year ending June 30, 1905, when under and by virtue of the laws in force at the time of the passage of said act, it has already paid taxes to the extent of one per cent. thereon.

(11) Said act in so far as it undertakes to impose a penalty of $200.00 a day for failure to pay said tax and to make the reports required in said act, is contrary to and in violation of section one, article fourteen of the amendments of the Constitution
18 of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the law, in this, that said penalties are wholly immoderate, unreasonable, and excessive and bear no just relation to the causes or matters with respect to which they are denounced. That upon the face of said act, it appears that they are prescribed with the intent and purpose that they shall operate as a threat and menace to defendant and other railway companies subject thereto, to the end that they may be compelled to make the reports and pay the tax provided for in the bill, although defendant in good faith believes said act to be violative of the provisions of the constitution of the State of Texas and of the United States. Said Act therefore deprives defendant of its property without due process of law. That

the laws of the State of Texas do not provide like penalties for the non-payment of any other tax by any other tax payer, and said bill in this respect is harsh, unequal, discriminatory, unreasonable and confiscatory, depriving this defendant of the equal protection of the law.

(12) That said provisions for penalties are contrary to that provision of the Bill of Rights of the State of Texas which provides in section thirteen, article one of the Constitution, that all courts shall be open and every person for any injury done him in his lands, goods, person or reputation shall have remedy by due course of law.

(13) That that portion of said bill imposing said penalties is violative of section thirteen, article one of the Constitution of the State of Texas, which provides that neither excessive fines nor
19 cruel nor unusual punishments shall be inflicted.

(14) That that portion of said act which provides for the infliction of said penalties is violative of section twenty-five of article three of the Constitution of the State of Texas, which provides that the subject of every bill shall be included in its title, the title of said bill not including said penalties therein denounced.

(15) That that portion of said act providing for the infliction of said penalties is invalid and void, for that said act is so indefinite and uncertain that it cannot be determined therefrom what tax shall be paid by those subject thereto, in this, that section one of the bill provides that all railroads shall pay to the state an annual tax for the year 1905 and each calendar year thereafter, of one per cent. upon its gross receipts, and section two provises that said tax shall be levied upon the gross receipts for the year ending June 30, 1905, and it is impossible to determine whether said one per cent. shall be calculated upon the gross receipts for the period of twelve months ending June 30, 1905, or whether that portion of said gross receipts from January 1, 1905 to June 30, 1905, shall be used as a basis of calculation.

(16) For the same reason mentioned in the sub-paragraph immediately preceding, the whole act is invalid and void.

(17) That it appears upon the face of plaintiff's petition and of said act that no recovery can be had herein for penalties for this that it is impossible to determine therefrom whether said tax of one per cent. shall be levied and calculated upon the total gross receipts for the year ending June 30, 1905, or whether only that proportion thereof shall be assessed against defendant as the time from
20 July 17, 1905 to the end of the year bears to the whole year.

(19) Said Act of the Legislature is contrary to and violative of section nine of article eight of the Constitution of the State of Texas, which provides that the State tax on property exclusive of the tax necessary to pay the public debt and all taxes providing for the benefit of free schools shall never exceed thirty five cents on the hundred dollars valuation.

(20) Said act is violative of section sixteen, article one of the Constitution of the State of Texas, which provides that no *ex post facto* law, retroactive law or law impairing the obligation of contracts shall be made.

(21) That said act of the Legislature is contrary to and in violation of article eight, section one of the Constitution of the State of Texas, in this, that if said act is intended for and is a tax upon the gross receipts of defendant corporation and is an income tax that the income contemplated by section one of article eight was not upon the income arising from the use of property already taxed and that to tax the income from property already taxed, is double, unequal and ununiform taxation contrary to section one, article eight of said constitution, and that in addition thereto such income tax, if imposed, must be imposed upon all persons or corporations other than municipal persons and no such income tax being imposed upon other persons and corporations in the State of Texas, the same is not equal and uniform taxation, as provided in said section and article of the Constitution of this State.

(22) Said tax imposed in said act is violative of section one, article fourteen of the amendments to the Constitution of
21 the United States in this, that it deprives defendant of the equal protection of the law, no like income tax being imposed upon other persons and corporations in said State.

(23) That said tax imposed by said act of the Legislature denies defendant the equal protection of the law contrary to said section one, article fourteen of the amendment- to the Constitution of the United States, in this, that thereby a tax of one per cent. on its gross income is imposed, while no like tax is imposed upon other persons and corporations in said State, and by section nineteen of article eight of the Constitution of the State of Texas incomes from lands used for farming purposes are exempted from taxation.

(24) That said act is violative of section ten, article one of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, in this, that it appears upon the face of plaintiff's petition that defendant is a corporation chartered under the laws of the State of Texas, as a common carrier of freight and passengers, with the power to do and perform all and singular the acts and things usually incident to the transaction of the business of a corporation. That said charter constitutes and is a contract between the State of Texas and defendant, under which the State of Texas extended to it the privilege and franchise confer-ed in said charter, and that the imposition of an unequal, unusual and confiscatory burden of taxation imposed by said bill is such as was not contemplated in such contract and operates to impair the obligations thereof.

(25) That said act, if considered as an occupation tax is contrary to and violative of the provisions of section two, article eight,
22 of the Constitution of Texas, which provides that all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax.

(26) That it appears upon the face of said act that in no event can plaintiff recover the total amount of one per cent. on defendant's gross receipts for the year ending June 30, 1905, but for only such proportion thereof as the time from July 17, 1905 to the end of the year bears to the entire year.

(27) That it appears upon the face of said act that plaintiff is not entitled to recover in any event one per cent. upon defendant's receipts from whatsoever source derived but that said recovery should be limited to one per cent. upon receipts derived from the transportation of freight, passengers and baggage only.

(28) That it appears upon the face of said act and of plaintiff's petition that same is violative of section one of article fourteen of the Constitution of the United States, in this, that it imposes upon this defendant and other railway corporations similarly situated a burden of taxation which is unequal, unreasonable, and discriminatory, and such as is not imposed upon other persons, citizens or taxpayers of the State of Texas, and therefore deprives defendant of the equal protection of the law.

(29) Under the Constitution and laws of the State of Texas and of the laws of the United States, defendant is authorized, empowered and required to connect with the railroads of other states and is engaged in the transportation of inter-state and foreign commerce and as such is an instrumentality of inter-state commerce and the act alleged, if considered as an occupation or privilege tax levies on defendant a tax far in excess of and in addition to the
23 regular ad valorem tax imposed under the general laws of the State of Texas and is a regulation, hindrance and obstruction to inter-state commerce, contrary to the third paragraph of section eight, article one of the Constitution of the United States, which provides that "Congress shall have power to regulate commerce with foreign nations and among the several states and with Indian tribes."

And of this its general demurrer and each and all of the above and foregoing special exceptions, defendant asks judgment of the Court.

IV.

Answering, if required so to do, defendants deny all and singular, each and every allegation in plaintiff's petition contained, and of this its general denial, defendant puts itself upon the country.

V.

Further answering, defendants, the Galveston, Harrisburg & San Antonio Railway Company, the Galveston Houston & Northern Railway Company, the New York & Mexican Railway Company and the Gulf, Western Texas & Pacific Railway Company allege that they and each of them are railroad corporations duly chartered as such under the laws of the State of Texas, at the dates hereinafter mentioned, to-wit:—

The G. H. & S. A. Ry. Co. by special Act of the Legislature of Texas, of date February 11th., 1850, and acts amendatory thereof;

The G. H. & N. Ry. Co. under the general law by charter of date March 25th, 1899.

24 The N. G. T. & M. Ry. Co. under the general law by charter of date October 18th, 1880;

The G. W. T. & P. Ry. Co., under the general law by charter of date April 5th, 1878, and prior to the 17th day of April, 1905, with

the rights, privileges and duties conferred and imposed upon railroad corporations, under the general laws of the State of Texas. That subsequent to June 30, 1905 and prior to the filing of this action, the Galveston, Harrisburg & San Antonio Railway Company, under the provisions of an act of the Legislature of the State of Texas of date May 11, 1905, for which see Chapter 58, p. 502 of the special laws of the Twenty Ninth Legislature of the state of Texas to which reference is here made, and the same is prayed to be taken as a part of this answer, acquired the property of its co-defendants herein. That for many years prior to the date of the acquisition of their said properties by the Galveston, Harrisburg & San Antonio Railway Company, and especially during the year ending June 30, 1905, said defendants owned, operated and conducted railways in the State of Texas, as follows, that is to say; The New York, Texas & Mexican Ry. Co. owned, operated and maintained a railroad from the city of Rosenburg in Fort Bend County through the counties of Fort Bend, Wharton, Jackson, Victoria and Matagorda, its principal office being situated at Victoria in Victoria County, embracing a main line mileage of 176.7 miles; that the Gulf, Western Texas & Pacific Railway owned, operated and conducted a railway from the city of Cuero in De Witt County, through the Counties of De Witt, Victoria and Calhoun to Port Lavaca on Lavaca Bay, an arm of Matagorda Bay and from the town of Victoria in said county
25 of Victoria through the counties of Victoria and Goliad to Beeville in Bee County, embracing a main line mileage of 111.1 miles; that the Galveston, Houston & Northern Railway owned, operated and conducted a line of railway from Galveston in Galveston County through the counties of Galveston and Harris to Houston in said County, a distance of 50.4 miles. That the principal office of said Gulf, Western Texas & Pacific Railway was situated in Victoria in Victoria County and of the Galveston, Houston & Northern Railway in Houston, Harris County. That prior to its acquisition of the railway lines of its above-mentioned co-defendants, the Galveston, Harrisburg & San Antonio Railway Company owned and operated a line of railway from Houston in Harris County, Texas, where its principal office is situated, through the counties of Harris, Fort Bend, Colorado, Fayette, Gonzales, Caldwell, Guadalupe, Bexar, Medina, Uvalde, Kinney, Maverick, Val Verde, Pecos, Brewster, Presidio, Jeff Davis, and El Paso to the city of El Paso on the border between the State of Texas and Mexico, embracing a total of 1241.86 miles of main line and 259.26 miles of yardage and sidings. That said system of railways thus owned by these defendants and now owned and operated by defendant, the Galveston, Harrisburg & San Antonio Railway Company, does now and did at the several times herein enquired about extend from the city of Galveston, a sea port and port of entry, with an extensive foreign and inter-state commerce, both by sea and land, both import and export, through the City of Houston in Harris County to Port Lavaca, situated upon the navigable waters of Matagorda Bay, through the City of San Antonio and intermediate cities to
26 the City of El Paso, situated on the border of Texas and near the territory of New Mexico. That at the City of

Houston, San Antonio and intermediate cities, it has connection with all the trunk railway systems of the State of Texas doing an inter-state and foreign, as well as a state business, both freight and passenger, and at the cities of Del Rio and El Paso, it has connection with railways extending into Mexico and doing a foreign business, both freight and passenger and at said latter city it has connection with inter-state railways extending into and through New Mexico and other territories and states of the United States and with foreign countries and that with each and all of its connecting railways, both state and inter-state, the said defendants did at each and all of the times aforesaid, as by law it was permitted and required to do, connect by physical connection of tracks and interchange freight and passengers, both state, inter-state and foreign. That said Galveston, Harrisburg and San Antonio Railway Company is now and has been for many years continuously prior to this date and each of its said co-defendants did for many years prior to the acquisition of their properties by the said Galveston, Harrisburg & San Antonio Railway Company, engage in the business of transportation for hire of passengers, freight and baggage, both state and inter-state, over their said lines of railway, and in the transaction of such other business as is commonly performed by common carriers. That under and by virtue of the terms of the act of May 11, 1905, to which reference is above made, the property of its co-defendants so acquired by the Galveston, Harrisburg & San Antonio Railway Company is bound and liable for all debts, charges and claims against said company and each of them and said properties are
27 chargeable in the hands of said Galveston, Harrisburg & San Antonio Railway Company with all debts, claims and charges of every kind whatsoever existing against each of said companies at the time of its acquisition, as aforesaid, by said Galveston, Harrisburg & San Antonio Railway Company.

VI.

That said lines of railway so owned and conducted by defendants are and were at times enquired about situated wholly within the State of Texas and under the Constitution and laws of the State of Texas and under the laws of the United States are authorized to connect with other lines of railway in said State of Texas and to connect with the lines of railway of other roads outside the State of Texas at the State line. That under the constitution and laws of the State of Texas and of the United States, defendants are and at times enquired of were common carriers of freight, passengers and baggage and authorized and required to receive, forward and transport freight and passengers between points within the State of Texas and between points in said State and points in other states of the United States and foreign countries, and as to such latter transportation, were and are inter-state carriers and such transportation is inter-state commerce. That during the year ending June 30, 1905, the gross receipts of defendants from freight, and passenger traffic and all other sources were as follows:

28 The G. H. & S. A. Ry. Co.:

Inter-state traffic	$5,209,389.79
Unapportioned "	684,324.42
Total	$7,472,458.48

The G. H. & N. Ry. Co.

Inter-state traffic	$946,057.49
Intra-state "	252,514.95
Unapportioned "	51,545.03
Total	$1,248,117.47

The G. W. T. & P. Ry. Co.:

Inter-state traffic	$31,121.81
Intra-state "	98,142.32
Unapportioned "	26,246.88
Total	$155,511.01

The N. Y. T. & M. Ry. Co.:

Inter-state traffic	$181,020.80
Intra-state "	281,556.09
Unapportioned "	47,181.21
Total	$509,458.17

VII.

That defendant has hitherto refused and does still refuse to make payment of the tax in accordance with the provisions of said gross receipts tax bill by plaintiff in its petition described, and says that it should not be compelled to pay the same and that said act
29 of the Legislature is wholly invalid, unconstitutional and void, among others, for the following reasons, to-wit:

(1) Defendant's said lines of railway are situated wholly within the State of Texas and are authorized by the laws of this State and of the United States to connect with other lines of railway in said State and lines outside of the State of Texas at the State line. That they are now and were at the several times hereinbefore set out under the Constitution and laws of this State and of the United States common carriers of freight and passengers and as such, authorized, required and compelled to receive and transport freight and passengers between points within the State of Texas and between points in said State and points in the United States and foreign countries and as to such latter transportation of freight and passengers, is an interstate carrier and such transportation is interstate commerce. That for the year ending June 30, 1905, defendant's gross receipts from its inter-state commerce were as alleged in the

paragraph next preceding and its gross receipts from intra-state commerce were as alleged in the paragraph next preceding.

eral years next immediately preceding the institution of this suit bear approximately the same relative ratio as for the year ending June 30, 1905, as aforesaid, all of which will more fully appear from the statement thereof, which is hereto attached and made a part hereof, marked Exhibit A.

That said act of plaintiff declared upon purports to levy a tax of one per cent. upon said gross receipts received for the transportation of inter-state and foreign commerce and the same is unconsti-
30 tutional and void, because the levy thereof on said receipts from inter-state and foreign transportation is in violation of the third sub-division of section eight, article one of the Constitution of the United States, which provides that "Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes" in that the levy and collection of such tax upon receipts from inter-state and foreign commerce is a regulation, obstruction and hindrance thereof. That defendant's rates on commerce within that State of Texas are, have been and will be fixed by the Railroad Commission of Texas and defendant, if disposed to do so, has and has had no power and has not been and will not be permitted by the Railroad Commission of said State to so adjust its rates as to impose on the intra-state commerce rates by which it may collect on freight traffic a sum equal to one per cent. of its inter-state and foreign commerce, so that if said sum of one per cent. on said receipts is required to be paid, it will be paid necessarily from said gross earnings on inter-state and foreign commerce.

(2) That under the Constitution of the State of Texas all property, whether owned by natural persons or corporations within said State, can only be taxed in proportion to its value; and all taxes must be equal and uniform; that such property shall be assessed in the several counties in which the same is situated, including as much of the road-bed and fixtures as is in each county, except that the rolling stock may be assessed in gross in the county where the principal office of the company is located, and the Comptroller must apportion the same to the several counties through which the road runs in proportion to the distance it runs in each county;
31 that all property whether owned by persons or corporations must be assessed for taxation and the taxes paid, in the county where situated, except that taxes of non-residents may, by two thirds vote of the Legislature, be authorized to be paid at the office of the Comptroller. That for the purpose of assessing property, the Constitution provides for the election in each county in the State of a tax collector to assess the property of persons and corporations for taxation, and the Constitution also provides that the Commissioners Court of the respective counties in the State shall constitute a board of equalization, with power and authority to equalize as near as may be the valuation of all property subject to or render- for taxation. That in pursuance of said Constitutional provisions, the Legislature of the State of Texas has heretofore passed laws in accordance with

the provisions thereof, and property in this State, whether owned by natural persons or corporations, has been subject to such local assessments for taxation by the assessors and boards of equalization since the adoption of the present Constitution. That such assessments so made by the assessors and approved and equalized by the boards of equalization of the respective counties is required by law to give a just, fair and proper valuation of all properties subject to taxation, and their action in making same is not subject to revision by any tribunal or department of government after the same is made and finally approved by the board of equalization; that the fixing of the value of property by the assessors and by the boards of equalization of the respective counties is a judicial determination of the value of the property assessed, which is final and conclusive, and not
32 subject to review by any authority in the State of Texas. That in accordance with the Constitution and laws of the State of Texas, defendant has rendered to the assessors of taxes in the respective counties through which its lines of railway run, and in which they are situated, and the assessors of taxes of each of said counties, respectively, assessed and the boards of equalization thereof approved and equalized, the assessments of all of your defendant's property situated in each of said counties, respectively, including its rolling stock, which was thus assessed in Harris County for the year 1905, and the action and judgment of the assessors in assessing the same, and the action and judgment of the boards of equalization of each of said counties, respectively, in approving and equalizing said assessments, has become final, and now fixes and establishes the value of your defendant's property for taxation situated and being in the State of Texas, and as defendant is advised and believes there is no method provided by law for the revision of such assessments and valuations, and that such assessments and valuations are in truth and in fact the true and actual proportionate valuations of said property. That all the taxes to which defendant is subject for State, county and independent school districts purposes are included in such assessments, and defendant will be compelled to pay, and will pay, the tax assessed against it for the year 1905. That in addition thereto the various organized cities, towns and villages through which defendant's lines of railway run, have in like manner and by authority of the Constitution and laws of the State of Texas, assessed and levied against defendant's property situated in such cities,
33 towns and villages, respectively, the taxes authorized to be levied by them, and each of them, which said taxes so levied and assessed defendant will be compelled to pay, and will pay, for the year 1905. That under any by virtue of the same provision of the law by which defendant is assessed, the property of other taxpayers situated in said counties through which defendant's lines of railway run, respectively, have been assessed and the assessments approved and equalized in the same manner and form as the property of defendant, and the said assessment, approval and equalization thereof has become final as in the case of defendant's property aforesaid; and that by like proceedings in the cities, towns and villages through which defendant's lines of railway run, the property of

other tax-payers, subject to taxation, has been assessed and taxes levied thereon for city purposes. That by the proceedings aforesaid, by the action and judgment of the assessors and boards of equalization of the respective counties, and of the officials of the cities, towns and villages and independent school districts aforesaid, the valuation of defendant's property and of the property of all tax-payers therein situated, respectively, has been determined and fixed for taxation, the value thereof has been equalized in accordance with law, and is now fixed and established, and the burden of taxation and of the expense of government has been determined, equalized, apportioned, fixed and established in proportion to the value of the property so rendered, assessed and equalized, and the same is final and conclusive. That defendant's property for the calendar year of 1905 has been so assessed, and said assessment approved and equalized as follows:—The G. H. & S. A. Ry. Co. at the sum of
34 $9,010,369.50 for county and State taxes; that for independent school districts it has been in like manner assessed at the sum of $2,274,185.00 and for cities, towns and villages at the sum of $822,565.00; The N. Y. T. & M. Ry. Co. for County and State purposes $1,188,340.00, for school districts $331,349.00; for cities $23,260.00. The G. W. T. & P. Ry. Co. for County and State purposes $839,830.00; for school districts $92,200.00; for cities $74,455.80; The G. H. & N. Ry. Co. for County and State purposes $407,575.00; for school districts $230,160.00, for cities $128,250.00; all of which will more fully appear from the attached Exhibit B, showing the assessment of that portion of property situated in each county, together with the apportionment of rolling stock, etc., which is prayed to be taken as a part hereof, as though set out at length herein.

That the assessed valuation of defendant's property has been approximately as herein set out for the last ten years next immediately preceding 1905, and taxes to the State, County, City and independent school districts paid thereon. That for all of the years since defendant had been a corporation it has paid the taxes legally assessed against it as aforesaid to the State of Texas, and for the several counties through which it runs, as well as to the several cities and independent school districts through which it extends; and that for the year 1905 it will pay its due proportion of all taxes due by it, and will thereby bear its proportionate burden of taxation on the value of its property compared with the taxation and burdens borne by other tax-payers situate in the respective counties where
35 its property is situated, and has thereby borne, and is bearing, its proper and proportionate burden of the expense of government as apportioned, fixed and established by the authorities of the State of Texas, and it says that the attempted levy of one per cent. tax upon the gross receipts of defendant by said gross receipts tax bill is an attempted unequal, unjust and arbitrary discrimination in taxation against defendant and other railway corporations of the State and in favor of other tax-payers and other property of said State, and is therefore void, because it is in violation of the fourteenth amendment to the Constitution of the United

States, and is in violation of the Constitution of the State of Texas, and especially in violation of Article 8 of said Constitution, and more especially in violation of Section 1, of Article 8, which provides that taxation shall be equal and uniform; all property in this State, whether owned by natural persons or corporations other than municipal, shall be taxed in proportion to its value, which shall be ascertained as provided by law; and is also in violation of the further provisions of said Section 1, Article 8, of the Constitution of Texas, which authorizes the Legislature to tax incomes of both natural persons and corporations, other than municipal, because said gross receipts tax bill does not levy or purport to levy, and the other statutes of the State of Texas do not levy, or purport to levy an equal and uniform tax on the incomes of both natural persons and corporations other than municipal, or upon the gross receipts of both natural persons and corporations other than municipal.

(3) That defendant is a railroad corporation and common
36 carrier engaged in the business of inter-state commerce by transporting freight, passengers, baggage, express matter and mails by itself and its connections between points in Texas and points in other states of the United States and foreign countries, and is an inter-state post road engaged in carriage of inter-state mails by contract with the United States Government and engaged in carrying the mails for said United States Government from points within this State. That all of its property is situated in the State of Texas, as hereinbefore stated, and has been assessed and the taxes paid thereon in proportion to its value, for the years preceding 1905, and has been in like manner assessed and the taxes paid for the year 1905, as hereinbefore fully set out; whereby it has borne its proportionate burden of taxation in proportion to the value of its property as aforesaid. That the tax provided for in said Gross Receipts Tax Bill is in addition to the tax aforesaid, and is a tax in addition to that for which defendant is liable in proportion to the value of its property. That same is an attempt to add to the taxation of defendant's property the burden of a tax on the privilege of using, conducting and operating an instr-mentality of inter-state and international commerce and is therefore unconstitutional and void and in violation of the Constitution of the United States and the provisions thereof which confer upon Congress the power to regulate commerce with foreign nations and among the several states and to established post offices and post roads. That for the year ending June 30, 1905, defendant received from the United States Government, for carrying United States Mails, the sums following: The
G. H. & S. A. Ry. Co., $129,000.00; The G. H. & N. Ry. Co.
37 $6,500.00; The N. Y. T. & M. Ry. Co., $12,000.00; the G. W. T. & P. Ry. Co., $5,000.00 and that it is beyond the power of the State of Texas to impose a tax upon said receipts, for that the same is taxing an agency of the government of the United States, regulating, obstructing and interfering therewith.

(4) Said Act is in contravention of that clause of Article 8, Section 1, of the Constitution of Texas, which provides that all property

in this State, whether owned by natural persons or corporations other than municipal, shall be taxed in proportion to its value, in this, that it is a universal rule throughout the State to assess property for taxative purposes at from about one half to two-thirds of its actual or market value, whereas this act requires that certain property and receipts from said property, shall be reported and taxed at a sum equal to and far greater than its actual full value, and that, after taxing defendant's property upon its full value under the regular ad valorem rate, said bill imposed a further and additional tax upon defendant, not in proportion to the value of its said property, but upon the basis of its productive power.

(5) Said Act is in contravention of Section 11, Article 8, of the Constitution of Texas, which provides that all property, whether owned by natural persons or corporations, shall be assessed for taxation, and the taxes paid, in the county where situated, whereas, under said act, the reports required to be made to the Comptroller are given effect as absolute assessments, and are required to be filed
38 with the Comptroller's office at Austin, regardless of where the property is situated, and said act requires said Comptroller to levy and assess said tax, contrary to the provisions of Section- 14, 15 and 18 of Article 8 of the Comstitution of the State of Texas, which provides that property shall be assessed in the several counties, by the duly elected and qualified county assessors thereof, and that the values thereof shall be equalized by the County Commissioners of said counties sitting as boards of equalization.

(6) Said Act is in contravention of Section 1 of the fourteenth amendment of the Constitution of the United States, providing that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, in this, that defendant and other railroads are selected from among the mass of persons and properties in the State and certain taxes are imposed upon them which are not imposed upon other persons and property in the State, and the reports of certain persons, officers and agents required by said act are given the effect of an absolute assessment of said property for taxation, in violation of the provisions of the Constitution of Texas, for the assessment of taxes and the payment of said tax is enforced by the imposition of ruinous and confiscatory forfeitures and penalties which are not imposed upon other persons and corporations.

(7) That in addition to the taxes imposed under the assessed valuations of defendant's property herein above set out, defendant has been compelled to pay, and is paying, franchise, or oc-
39 cupation taxes, as provided by act approved March 1, 1905, to which, as same appears in acts of the Twenty-ninth Legislature, Chapter 19, page 21, reference is here made, said bill imposing a tax of one dollar on each two thousand dollars, or fractional part thereof, of the authorized capital stock of corporations up to and including one hundred thousand dollars, and up to and including one million dollars, and one dollar on each twenty thousand dollars, or fractional part thereof, of said stock in excess of one

million and up to and including ten million dollars, and one dollar of each fifty thousand dollars or fractional part thereof, in excess of ten million dollars; such tax not to be less than ten dollars in any case. That under the provisions of said act defendant has been compelled to pay franchise taxes as follows:—

The G. H. & S. A. Ry. Co.	$997.00
The G. W. T. & P. Ry. Co.	630.00
The N. G. T. & M. Ry. Co.	190.00
The G. H. & N. Ry. Co.	90.00

That to compel defendant in addition to said taxes and the taxes hereinabove referred to, under the pretense of paying an occupation or privilege tax, to pay the ruinous and confiscatory amounts demanded in said Gross Receipts Tax Bill, will be to deprive it of its property without due process of law, and to deny it the equal protection of the laws, contrary to Section 1, Article 14, of the amendments to the Constitution of the United States.

(8) That in addition to the taxes which defendant will be
40 compelled to pay under and by virtue of the assessment hereinabove set out and the franchice or privilege tax referred to in the paragraph next preceding, defendants have been compelled to pay by the State of Texas a tax of one per cent. on their gross passenger revenues earned within the State of Texas for the year ending June 30, 1905, to-wit: the aggregate sum of $12,454.00. That said passenger receipts will likewise be included in the gross receipts taxed in said Gross Receipts Tax Bill, and defendant says that to again impose a tax of one per cent. upon such receipts, as provides in said bill, is not that equal and uniform taxation provided for in Section 1, Article 8 of the Constitution of the State of Texas, and that it deprives defendant of the equal protection of the law, contrary to Section 1, Article 14, of the amendments to the Constitution of the United States.

(9) That said bill is contrary to the provisions of Section 8, Article 8 of the Constitution of the State of Texas, which provides that all property of railroad companies shall be assessed and the taxes collected in the several counties in which said property is situate, including so much of the road bed and fixtures as shall be in each county. The rolling stock may be assessed in gross in the county where the principal office of the company is located, and the county tax paid upon it shall be apportioned by the Comptroller in proportion to the distance such road may run through any such county among the several counties through which the road passes, as a part of their assets.

(10) Said bill is contrary to Sections 11, 14, 15, and 18
41 of Article 8 of the Constitution of the State of Texas, in this, that it provides that the Comptroller shall levy and assess the tax of one per cent. on gross receipts thereon provided for, whereas Section 11 provides that all property shall be assessed for taxation, and the taxes paid, in the county where situated. Section 14: There shall be elected by the qualified electors of the County

an assessor who, as provided in Section 14, shall assess said property for taxation. Section 18 thereof provides that the Commissioners Court of each county shall constitute a board of equalization for the purpose of equalizing as near as may be the value of all property rendered for taxation. Said bill therefore deprives the county assessors and boards of equalization of their constitutional powers and prerogatives, and confers the same upon the Comptroller of the State.

(11) That the penalties provided for in said bill for failure to comply with the provisions thereof are wholly immoderate, unreasonable and excessive, and bear no just relations to the causes or matters with respect to which they are denounced. That said unreasonable and excessive penalties, as defendant believes and alleges, are prescribed with the intent and purpose that same shall operate as a threat and menace to defendant, and to other railway companies subject to the operation of said bill, to the end that it may be compelled and coerced into making the reports and payments of said tax and complying with the other provisions of said bill, whether or not the same shall be reasonable, fair or just. That the enforcement of the penalties therein prescribed would result in serious loss and
42 damage and bankruptcy to defendant, and other railway companies subject thereto, and that the laws of the State of Texas do not provide like penalties for the non-payment of other taxes by other tax-payers, but the operation of said bill in this respect is harsh, unequal and discriminatory, unreasonable and confiscatory. That said bill is contrary to and in violation of Section 1 of the fourteenth amendment to the Constitution of the United States, in that it deprives defendant of its property without due process of law and denies to it the equal protection of the law, and is contrary to the provision of the Bill of Rights of the State of Texas which provides in Section 13, Article 1, of said Constitution that all courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have remedy by due course of law; the imposition of said excessive and confiscatory penalties being for the purpose of preventing defendant and others similarly situated from testing the validity of the same in the Courts of the country, although it should believe, as it does believe, upon reasonable grounds, that the same is invalid and void, as contrary to the Constitution of the United States and of this State and that that portion of said bill imposing said penalties is violative of Section 13, Article 1, of the Constitution of the State of Texas, which provides that neither excessive fines nor cruel or unjust punishments shall be inflicted; and of Section 35 of Article 3, of the said Constitution, which provides that the subject of every bill shall be included in its title; the title of said bill not including said penalties therein denounced.

43 (12) That said Bill as a whole, and especially those portions thereof attempting infliction of fines and penalties, is invalid and void, for that the same is so indefinite and uncertain as that it cannot be determined therefrom what taxes shall be paid

by those subject thereto, in this: that Section 1 of said bill provides that all railroads, etc., shall pay to the State an annual tax for the year 1905, and each calendar year thereafter; and Section 2 thereof provides that said tax of one per cent. shall be levied upon the gross receipts for the year ending June 30, 1905, and it is impossible to determine whether said one per cent. shall be calculated upon the gross receipts for the period of twelve months, ending June 30, 1905, or whether that portion of such gross receipts from January 1, 1905, to June 30, 1905 shall be used as a basis of calculation, or whether said tax shall be calculated only for the unexpired portion of the year.

12*a*. Defendant says that the Treasurer of the State of Texas, acting under the advice and instructions of the Attorney General and Comptroller of the State of Texas, was and always has been and is now demanding from this defendant payment of a full one per cent. of its gross receipts from every source and has repeatedly and does now refuse to accept from this defendant or any other railroad company in this State any less amount than one per cent. on its entire gross receipts from every source for the fiscal year ending June 30, 1905, and this defendant alleges that if this defendant had tendered any amount less than one per cent. as aforesaid, the same would not have been accepted by said Treasurer and that he has repeatedly so stated, and a tender upon the part of de-
44 fendant for any part of said tax would have been useless and ineffectual.

That this defendant presented said petition to the Judge of this Court on the 29th. day of September, 1905, with the request that he immediately grant the injunction therein prayed for and determine what if any tax was due; that the Judge of this Court set the matter for hearing in chambers on Sept. 30th., 1905, and that the defendants in said suit requested that the application for injunction in said suit be not heard on said 30th. day of September, 1905, and that thereupon it was agreed by said plaintiff and defendants, with the approval of the court, that said suit should be on the docket for final hearing on the 17th. day of October, 1905, and that if injunction should be granted on the hearing of said cause, such injunction should relate back to and be operative from the 30th. day of September, 1905; that on said 17th. day of October, 1905, said cause came on to be heard by this Court, whereupon the court sustained the general demurrer of the defendants in said petition, as well as certain special exceptions filed by the defendant thereto, and the plaintiff, now this defendant, declined to amend, and the Court dismissed said suit; that from the judgment of the Court dismissing said suit this defendant, the plaintiff therein, has prosecuted an appeal to the Court of Civil Appeals for the 3rd Judicial District of the State of Texas, and that the cause has been set for hearing on appeal in said court on the 6th day of December, 1905; that this defendant, which is the appellant in said cause, in the Court of Civil Appeals, has briefed said cause and is doing and has done all in its power to obtain a speedy disposition thereof; that in the
45 manner before alleged this defendant has knocked at the door of the court and has done all in its power to obtain relief

from the unconstitutional tax imposed by this act, as well as from the unconstitutional penalties announced thereby.

(13) Defendant is advised that plaintiff will contend that said tax imposed by said Act of the Legislature is an occupation tax but defendant protesting that same is in truth and in fact a property tax and was so intended by the Legislature, says that if the same is an occupation tax, it is a tax upon the privilege or occupation of conducting an inter-state and foreign business and of performing a function of the Government of the United States delegated to it by such government, to-wit, the transportation of the United States mails, state and inter-state, and as such is invalid and void. That defendant having already been taxed, as hereinabove alleged, under the general rate of ad valorem taxation in proportion to the value of its property, said tax herein sought to be imposed, imposed upon defendant, in addition to such ad valorem taxation a burden of taxation more than twice as great as the taxation imposed under the regular ad valorem rate and such additional burden of taxation being collected from defendant's receipts from inter-state and foreign commerce is contrary to the third paragraph of section eight, Article one of the Constitution of the United States, providing that Congress shall have the power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

(14) That if said tax should be considered as an occu-
46 pation tax, the same is in violation of section two, article eight of the Constitution of the State of Texas, which provides, that "all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the taxes," in this, that said tax is not laid upon other occupations of the same class. That other public service transportation companies being public common carriers are not subject thereto. That no similar tax is laid upon street railway companies, or electric interurban railway companies transporting freight and passengers or upon common carriers such as vessels and boats upon the rivers, canals, bayous, lakes or bays of said State and in the Gulf of Mexico between ports in said State, with each and all of whom defendant has been, is and will be in active competition in the carriage of freight, passengers and baggage between points within this State, as well as in the carriage of inter-state and foreign commerce and that said competition is substantial, applying to and affecting a large proportion of defendant's business, as defendant has been and will be compelled to carry for the same rates charged by such other carriers and that such competition with such other common carriers affects in the manner aforesaid a large proportion, probably about one-half, of defendant's business; that if an occupation tax, same is unequal and discriminatory and therefore contrary to said Section 2, Article 8 of the Texas Constitution, for the reason that the Texas & Pacific Railway Company, whose line extends from El Paso on the Western border of Texas, where it connects with complainant's road, through many of the largest cities of
47 Texas, and through Meskin in the eastern boundary of said State through the State of Louisiana to the City of New

Orleans, and which does a large business, state, inter-state and foreign in direct competition with complainant, is not subject thereto, and for the same reason said act deprives defendant of the equal protection of the law contrary to the 14th. Amendment to the Constitution of the United States. That by the exemption of such other carriers from said tax or any similar tax, they, if said one per cent. tax in enforced, will be given an unfair advantage. That each and all of said public common carriers, to-wit, inter-urban electric car lines, sleeping car companies, express companies, boats and vessels, each and all carry passengers, freight and baggage in the same manner as defendant, and they cannot reasonably be classified as a different class from this defendant. That the tax laid upon the gross receipts of sleeping car and express transportation companies is in lieu of and not in addition to all other taxation of an ad valorem nature, as in the case with this defendant. That such tax is not intended in good faith as an occupation tax, but is in truth and in fact a false and fraudulent scheme and device under the guise and pretense thereof, to levy in addition to the ad valorem tax now imposed by law, as above alleged, an additional, unreasonable and confiscatory burden of taxation, out of all due proportion to all other occupation taxes imposed by law and to the amount and burden of taxation imposed upon other persons, corporations and property, to such extent that the same in unreasonable, unjust, arbitrary and capricious and is double, unequal, unjust and un-

uniform taxation contrary to section one of article eight of
48 the Constitution of the State of Texas and contrary to section nineteen of article one of the Constitution of the State of Texas, which provides that no citizen of this state shall be deprived of life, liberty or property except by due course of the law of the land, and contrary to section one of the fourteenth amendment to the Constitution of the United States, which provides that no state shall deprive any person of his property without due process of law nor deny to any person within its jurisdiction the equal protection of the law. That defendant's railway at the times alleged herein and for a long time prior thereto and now, extends into and through organized counties, cities and towns, chartered and organized, both by special charter and under the general law of this State, in part as follows:—

The G. H. & S. A. Ry. Co. eighteen Counties, and twenty cities and towns;

The G. H. & N. Ry. Co. two counties and two cities and towns;

The G. W. T. & P. Ry. Co. five Counties and five cities and towns;

The N. Y. T. M. Ry. Co. five Counties and five cities and towns.

That each of said counties, cities and towns in the State of Texas through which lines of railway extend and are operated and authorized under the Constitution and laws of this State, to levy an occupation tax in an amount equal to one half of that levied by the State of Texas. That if said act of the Legislature should be construed as

levying an occupation tax, each of said counties, cities and
49 towns will assert the right to collect from this defendant a tax of one half of the amount levied and herein sought to be

collected by the State of Texas. That said tax so levied would be confiscatory in amount and character and together with the tax sought under said bill to be collected by the state, would burden, hinder and obstruct commerce between the states and with foreign nations, contrary to the provisions of section eight, article one of the Constitution of the United States and would be so grossly excessive and discriminatory in its character as to amount to the confiscation of defendant's property, contrary to section seventeen of article one of the Constitution of the State of Texas, which provides that no person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person, and contrary to the provision of section nineteen of article one of the Constitution of the State of Texas, which provides that no citizen of this state shall be deprived of life, liberty or property except by due course of the law of the land, and in violation of section four or article four of the Constitution of the United States, which guarantees to each state a republican form of government, and in violation of section one of article eight of the Constitution of the State of Texas, which provides that taxation shall be equal and uniform and all property shall be taxed in proportion to its value, and of section two of article eight of the constitution which provides that all occupation taxes shall be equal and uniform upon the same class of subjects and in contravention of section one of article fourteen of the amendments to the Constitution
50 of the United States which provides that no state shall deprive any person of life, liberty or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the law.

14*a*. Defendant further avers that the said Gross Receipts Tax Bill and the Intangible Tax Act, approved April 17th, 1905, are each parts and parcels of the fraudulent system or scheme, and an attempt upon the part of the Legislature to impose unjust and unreasonable and disproportionate taxes taxes upon the railway lines of Texas; that the said two acts and the said franchise tax act should all be read together; that it is provided in Section 7 of the said Gross Receipts Tax Bill, that the tax imposed thereunder should not be collected when the railway company should comply with the Intangible Tax Law, and pay the taxes thereunder; and it is provided in Section twelve of the said Intangible Tax Law that upon the taking effect thereof, and upon the compliance therewith by those subjected thereto, that all laws levying taxes upon the gross receipts would thereby be repealed.

Defendant says that this scheme of taxation would in effect be a delegation of the operation and repeal of acts of the Legislature to the persons and corporations affected by said laws, and would be in direct violation of Section 28 of the Bill of Rights of the State of Texas providing that no power of suspending laws in the State of Texas should be exercised except by the Legislature; that the said scheme of taxation would also result in the inequality of taxes, in that if one railway corporation complied with the Intangible
51 Tax Law and paid the taxes thereunder, and another did not, the one so complying would not be subject to the Gross Re-

ceipts Tax Bill, and the one not complying would be subject to the Gross Receipts Tax Bill, thereby producing confusion and inequality in the tax laws of the State, and in violation of the provisions of the Constitution which says that all taxes shall be equal and uniform.

(15) That defendants were chartered on or about the dates above alleged, with power to do and pe-form all and singular the acts and things incident to the transaction of the business of a railroad company under the General Laws of the State, including the transportation of passengers and freight, state and inter-state, which powers and franchise were in full force and effect at the time of the passage of said act and are now in force. That under said charter and under the Constitution and laws of this State, said defendant is authorized and compelled to pursue the occupation of conducting a railroad as a common carrier of freight and passengers. That it was chartered for and can pursue no other business. That said charter constitutes and is a contract by and between the State of Texas and defendant, under which in consideration of the burdens then and there assumed by defendant, the State of Texas extended to it the privilege and franchise of exercising the rights conferred in said charter and by the laws of this State. That the burdens of taxation imposed by this bill are so extraordinary in amount and unequal, unusual and confiscatory in character and not being authorized by the laws in force at the time of the issuance of said charter, are such as were not contemplated therein and operate to impair the obligation of said valid contract, contray to the provisions of section ten, article
52 one of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, and contrary to section sixteen of article one of the State of Texas, which provides that no law impairing the obligation of contracts shall be made.

(16) That said Act of the Legislature is violative of Section 9 of Article 8, of the Constitution of the State of Texas, which provides that the State tax on property, exclusive of the tax necessary to pay the public debt, and of taxes provided for the benefit of public free schools, shall never exceed thirty five cents on the hundred dollars valuation; whereas, by said act, defendant is taxed one dollar on the hundred dollars valuation; of a certain portion of its property and said tax, added to the ad valorem State tax of thirty five cents on the hundred dollars valuation, as finally determined by the tribunals having jurisdiction thereof, as hereinbefore alleged, and as to such excess is void.

(17) Said Act if violative of Section 16, Article 1, of the Constitution of the State of Texas, which provides that no *ex post facto* law, retroactive law, or law impairing the obligation of contracts shall be made, in this, that same was not passed until April 17, 1905, and did not become effective until July 17, 1905, and the same imposes a tax for the year ending June 30, 1905, or at least for that portion of the year 1905 prior to July, 1905, thereby, by a retroactive law, seeking, if considered as an occupation tax, to impose burdens upon

a business which, when exercised, was not subject to such
53 burdens, and by an *ex post facto* law to punish as a crime the non-payment of such tax, and if considered as a property tax, by a retroactive law to tax defendant's property for a past period during which it had paid all taxes levied for such period by the then existing law.

(18) That said Act of the Legislature is contrary to and in violation of Article 8, Section 1, of the Constitution of the State of Texas, in this, that said tax is intended for, and is a tax upon the gross receipts of defendant's corporation, and is in truth and in fact an income tax; that it was not contemplated by Section 1, of Article 8, of the Constitution of the State of Texas, that property should be taxed, and that at the same time the income arising from the use of said property should likewise be taxed. That the right of way, road-beds, railway tracks, depots, warehouses, terminal facilities, rolling stock, franchises and all appurtenances of defendant are, as hereinbefore particularly set out, assessed and taxed at the same rate of taxation as other persons and corporations in the State, and that defendant's income, as hereinabove specifically set out, arises from the use and operation of the property aforesaid, and to tax also such income is double, unequal and discriminatory taxation, and is not such an income tax as was contemplated by said section, in this, that the income there referred to is not the income arising from the use of property already taxed under the general taxation laws applicable to all persons or corporations in the state, but to such incomes as do*es* not arise from the use of taxable property, and that under said Section 1, Article 8, of the Constitution of the State of Texas,
54 an income tax, if imposed, must be imposed upon all natural persons or corporations other than municipal corporations; and said bill does not, nor does any other law of the State of Texas, provide for an income tax, either upon natural persons upon other than a few classes of corporations; but to the contrary, there is no income tax imposed upon natural persons; and more than ninety nine per cent. of the corporations chartered under the laws of this state and foreign corporations doing business in this State, are exempted from the payment of such tax. Therefore said act is in violation of said Section 1, Article 8, of the Constitution of the State of Texas, and is in violation of Section 1, Article 14, of the amendments to the Constitution of the United States, in this, that defendant is thereby deprived of its property without due process of law, and is denied the equal protection of the law.

(19) Defendant further shows that by the provisions of said bill, it is denied the equal protection of the law guaranteed by Section 1, Article 14, of the Amendments to the Constitution of the United States, in this, that thereby a tax of one per cent. on its gross income is imposed, while by Section 19, of Article 8, of the Constitution of the State of Texas, incomes from lands used for farming purposes are exempt from taxation, said Section 19, being as follows:—

"Farm products in the hands of the producers and family supplies for home and foreign use are exempt from all taxation unless other-

wise directed by two-thirds vote of the members elected to both houses of the Legislature."

55 That the income from farming lands owned by individuals and corporations constitute eighty per cent. at least of the wealth produced in the State of Texas, and that to exempt such property from taxation, and to tax incomes from lands and property owned by railway corporations, is to deprive them of the equal protection of the law guaranteed them by the Federal Constitution.

VIII.

Defendants say that their gross receipts from passenger earnings for the quarter ending September 30, 1905, were as follows:

The G. H. & S. A. Ry. Co., which includes the G. W. T. & P. and N. Y. T. & M. $203,382.21; The G. H. & N. Ry. Co. $35,682.54. but that although the court should hold said act of the Legislature by plaintiff declared upon invalid, nevertheless plaintiff is not entitled to collect the tax of one per cent upon said gross receipts, for the reason that under the provisions of section six of said act, all statutes imposing a tax upon the gross passenger earnings of railroads are repealed and said repealing section operates to repeal said tax of one per cent. on all passenger earnings within this State, notwithstanding the remainder of said act shall be held to be invalid.

Defendants pray that plaintiff take nothing by this suit and that they and each of them be discharged with their costs.

BAKER, BOTTS, PARKER & GARWOOD,
Attorneys for Defendnts.

56 EXHIBIT "A."

Railroad Tax Statement.

HOUSTON, TEXAS, *September* 26, 1905.

To the Comptroller of Texas:

Statement by the Galveston, Harrisburg and San Antonio Railway Company, in accordance with chapter 141, Acts of the Twenty-ninth Legislature of the State of Texas, for the year ending June 30, 1905.

The length of the line of said Railway within and without the State of Texas is	916.18 miles.
The length of the portion of said Railway within the State of Texas is	916.18

The Gross receipts of said line of railway, from all sources whatsoever, for the year ending June 30, 1905, were $7,472,458.47.

The term "Gross Receipts" as used in this report, includes the following:

Receipts from inter-state traffic	$5,209,389.79
Receipts from Intra-state traffic	1,578,744.11

Unapportioned:

Mail	129,160.22
Express	78,752.93
Switching	57,673.09
Extra Baggage	18,068.56
Car Service	293,792.73
Locomotive Mileage	106,877.04
Total	$7,472,458.47

$32,640.53.

57 The above report is made under protest, said Railway Company reserving the right to contest the validity of the law herein referred to as contrary to, and in violation of, the Constitution of the United States and of the State of Texas; this report being made without recognizing the right of the State of Texas to compel the making thereof, and wihout recognizing the right of the State of Texas to assess or collect said taxes, and without intending to pay the same.

—— ——.

THE STATE OF TEXAS, *Harris County:*

—— —— being duly sworn, states that he is — of the Galveston Harrisburg and San Antonio Railway Company, with offices in Houston, Texas; that the statement made above shows the entire mileage of said Railway, within and without the State of Texas, the number of miles within Texas, the Gross Receipts of said line of Railway from all sources whatsoever within the time stated herein, and that said statement is true and correct.

—— ——.

Sworn to and subscribed before me this 26th day of September, 1905.

—— ——.

58 *Railroad Tax Statement.*

HOUSTON, TEXAS, *September* 26, 1905.

To the Comptroller of Texas:

Statement by the New York, Texas and Mexican Railway Company, in accordance with chapter 141, Acts of the Twenty-ninth Legislature of the State of Texas, for the year ending June 30, 1905.

The length of the line of said railway within and without the State of Texas is 176.71 miles.

The length of the portion of said railway within the State of Texas is 176.71 miles.

The Gross receipts of said line of Railway, from all sources whatsoever, for the year ending June 30, 1905, were $509,458.17.

The term "Gross Receipts" as used in this report, includes the following:—

Receipt from Inter-state Traffic	$181,020.80
Receipts from Intra-state Traffic	281,556.09
Unapportioned:—	
Mail	12,019.87
Express	8,012.80
Extra Baggage	1,199.12
Switching	586.75
Car Service	21,626.76
Locomotive Mileage	3,435.98
Total	$509,458.17

59 The above report is made under protest, said Railway Company reserving the right to contest the validity of the law herein referred to as contrary to, and in violation of, the Constitution of the United States and of the State of Texas; this report being made without recognizing the right of the State of Texas to compel the making thereof, and without recognizing the right of the State of Texas to assess or collect said taxes, and without intending to pay same.

—— ——.

THE STATE OF TEXAS, *Harris County:*

—— —— being duly sworn, states that he is — of the New York, Texas and Mexican Railway Company, with offices in Houston, Texas; that the statement made above shows the entire mileage of said Railway, within and without the State of Texas, the number of miles within Texas, the Gross receipts of said line of railway from all sources whatsoever, within the time stated herein, and that said s-atement is true and correct.

—— ——.

Sworn to and subscribed before me this the 26th. day of September, 1905.

—— ——.

60 *Railroad Tax Statement.*

HOUSTON, TEXAS, *September* 26, 1905.

To the Comptroller of Texas:

Statement by the Gulf, Western Texas and Pacific Railway Company, in accordance with chapter 141, Acts of the Twenty-ninth Legislature of the State of Texas, for the year ending June 30, 1905.

The length of the line of said railway within and without the State of Texas is 111.42 miles.

The length of the portion of said railway within the State of Texas is 111.42 miles.

The Gross Receipts of said line of railway, from all sources whatsoever, for the year ending June 30, 1905, were $155,511.01.

The term "Gross Receipts" as used in this report, includes the following:—

Receipts from inter-state traffic	$31,121.81
Receipts from intra-state traffic	98,142.32
Unapportioned:—	
Mail	5,371.17
Express	5,984.30
Extra Baggage	841.33
Switching	1,056.15
Car Service	11,155.43
Locomotive mileage	1,838.50
Total	$155,511.01

667.60

61 The above report is made under protest, said railway company reserving the right to contest the validity of the law herein referred to as contrary to, and in violation of, the Constitution of the United States and of the State of Texas; this report being made without recognizing the right of the State of Texas to compel the making thereof, and without recognizing the right of the State of Texas to assess or collect said taxes, and without intending to pay the same.

—— ——.

THE STATE OF TEXAS, *Harris County:*

—— —— being duly sworn, states that he is — of the Gulf, Western Texas and Pacific Railway Company, with offices in Houson, Texas; that the statement made above shows the entire mileage of said Railway, within and without the State of Texas, the number of miles within Texas, the Gross Receipts of said line of Railway from all sources whatsoever within the time stated herein, and that said statement is true and correct.

—— ——.

Sworn to and subscribed before me this the 26th. day of September, 1905.

62 *Railroad Tax Statement.*

HOUSTON, TEXAS, *September* 26, 1905.

To the Comptroller of Texas:

Statement by the Galveston, Houston & Northern Railway Company, in accordance with chapter 141, Acts of the Twenty-ninth Legislature of the State of Texas, for the year ending June 30, 1905.

The length of the line of said railway within and without the State of Texas is 54.20 miles;

The length of the portion of said railway within the State of Texas is 54.20 miles;

The Gross Receipts of said line of railway, from all sources whatsoever, for the year ending June 30, 1905, were $1,248,117.47.

The term "Gross Receipts" as used in this report, includes the following:—

Receipts from inter-state traffic	$946,057.49
Receipts from intra-state traffic	252,514.95
Unapportioned:—	
Mail	6,475.28
Express	5,840.13
Extra Baggage	1,049.35
Switching	18,132.75
Car Service	14,717.12
Locomotive Mileage	3,330.40
Total	$1,248,117.47.

$513169

63 The above report is made under protest, said Railway Company reserving the right to contest the validity of the law herein referred to as contrary to, and in violation of, the Constitution of the United States and of the State of Texas; this report being made without recognizing the right of the State of Texas to compel the making thereof, and without recognizing the right of the State of Texas to assess or collect said taxes, and without intending to pay same.

——— ———.

STATE OF TEXAS, *Harris County:*

——— ——— being duly sworn, states that he is — of the Galveston, Houston and Northern Railway Company, with offices in Houston, Texas; that the statement made above shows the entire mileage of said Railway, within and without the State of Texas, the number of miles within Texas, the Gross receipts of said line of railway from all sources whatsoever, within the time stated herein, and that said statement is true and correct.

——— ———.

Sworn to and subscribed before me this the 26th. day of September, 1905.

——— ———.

64 EXHIBIT "B."

Sunset Lines, Texas.

Statement Showing the Valuation of Property as Fixed by the Boards of Equalization, Year 1905.

The Galveston, Harrisburg & San Antonio Railway Company.

County.	Mileage.	Valuation of property.	Apportionment rolling stock.	Total valuation.
Harris	25.45	$203,600.00	$50,016.00	$253,616.00
Fort Bend	33.77	270,160.00	66,368.00	336,528.00
Wharton	12.25	110,250.00	24,075.00	134,325.00
Colorado	53.21	433,890.00	104,575.00	538,465.00
Fayette	36.20	285,900.00	71,145.00	357,045.00
Gonzales	34.75	316,775.00	68,294.00	385,069.00
Caldwell	10.22	102,200.00	20,085.00	122,285.00
Guadalupe	36.61	292,880.00	71,950.00	364,830.00
Bexar	40.31	463,565.00	79,220.00	542,785.00
Medina	42.15	379,350.00	82,837.00	462,187.00
Uvalde	45.50	455,000.00	89,420.00	544,420.00
Kinney	50.86	442,482.00	99,955.00	542,437.00
Maverick	27.69	221,520.00	54,420.00	275,940.00
Val Verde	99.36	745,200.00	195,270.00	940,470.00
Pecos	71.76	502,320.00	141,030.00	643,350.00
Brewster	80.43	542,902.50	158,068.00	700,970.00
Presidio	43.28	313,780.00	85,057.00	398,837.00
Jeff Davis	25.79	180,530.00	50,685.00	231,215.00
El Paso	145.96	948,740.00	286,855.00	1,235,595.00
	915.55	7,211,044.50	1,799,325.00	9,010,369.50
65 Thirteen Cities				822,565.00
School Districts				2,274,185.00
Grand Total				$12,107,119.50

New York, Texas & Mexican Railway Company.

County.	Mileage.	Valuation of property.	Apportionment rolling stock.	Total valuation.
Fort Bend.....	15.31	$99,515.00	$9,830.00	$109,345.00
Wharton.....	53.53	363,440.00	34,369.00	397,809.00
Jackson.....	22.97	183,760.00	14,748.00	198,508.00
Victoria	15.39	115,425.00	9,881.00	125,306.00
Matagorda	69.50	312,750.00	44,622.00	357,372.00
	176.70	1074,890.00	113,450.00	1,188,340.00
Three Cities.....				23,260.00
School Districts				331,349.00
Grand Total.....				$1,542,949.00

Gulf, Western Texas & Pacific Railway Company.

County.	Mileage.	Valuation of property.	Apportionment rolling stock.	Total valuation.
Calhoun	10 22	$61,320.00	$6,368.00	$67,688.00
Victoria	44.80	313,600.00	27,916.00	341,516.00
De Witt.....	12.48	90,480.00	7,777.00	98,257.00
Goliad	30.25	211,750.00	18,850 00	230,600.00
Bee.	13.35	93,450.00	8,319.00	101,769.00
	111.10	770,600.00	69,230.00	839,830.00
66 Three Cities				74,405.80
School Districts				92,200.00
Grand Total.....				1,006,435.80

Galveston, Houston & Northern Railway Company.

County.	Mileage.	*Valuation of* property.	*Apportionment* rolling stock.	Total valuation.
Harris	27.50	$206,250.00	$34,880.00	$241,130.00
Galveston	22.90	137,400.00	29,045.00	166,445.00
	50.40	$343,650.00	$63,925.00	$407,575.00
Two Cities				128,250.00
School Districts				230,160.00
Grand Total				$765,985.00

(Endorsed:) No. 23358. State of Texas *vs.* G. H. & S. A. Ry. Co. *et al.* Def'ts. Original Answer. Filed Nov. 28, 1905, Jas. P. Hart, Clerk.

67 *Plaintiff's First Supplemental Petition.*

Filed December 5, 1905.

In the District Court of Travis County, 26th Judicial District of Texas.

No. 23358.

THE STATE OF TEXAS
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RY. CO.

Now in the above entitled cause, comes the State of Texas, plaintiff, by her Attorney General, and in response to the answer of defendant heretofore filed in said cause, says:—

1.

Plaintiff demurs to said answer, and to each and every allegation thereof, and says the same presents no legal defense to plaintiff's cause of action, as set forth in the original petition in this cause; and of this plaintiff prays judgment of the Court:

2.

Plaintiff denies each and every allegation in said answer contained and demands strict proof; and of this she puts herself upon the country.

R. V. DAVIDSON,
Attorney General,
W. E. HAWKINS,
Assistant Attorney General,
For Plaintiff.

68 (Endorsed:) No. 23358. The State of Texas *vs.* Galveston, Harrisburg & San Antonio Railway Company, Plaintiff's First Supplemental Petition. Filed Dec. 5, 1905, Jas. P. Hart, Clerk.

Judgment.

December 8th, 1905.

23358.

THE STATE OF TEXAS
vs.
THE GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY ET AL.

This cause coming on to be heard on the 8th. day of December, 1905, the State of Texas, plaintiff, appearing by her Attorney General, and the defendants appearing by their attorneys of record, whereupon the defendants withdrew their plea in abatement concerning the authority of the Attorney General to institute and prosecute this case, and withdrew their special exception No. 1, and the first paragraph or subdivision of their special exception No. III. relating to the same subject, and expressly waived said plea and exception.

Thereupon came on to be heard the general demurrer and special exception of the defendants to plaintiff's petition and the same having been duly considered by the Court,

It is ordered, adjudged and decreed that the general demurrer of the defendants to plaintiff's petition and the 2nd., 3rd.,
69 4th., 5th., 6th., 7th., 8th., 9th., 10th., 16th., 19th., 20th., 21st., 22nd., 23rd., 24th., 25th., 28th., and 29th., paragraphs or subdivisions of the specials exception of the defendants numbered III be, and the same are hereby, overruled, to which ruling of the Court defendant excepted;

And it is further ordered, adjudged and decreed that the 26th. and 27th. paragraphs or subdivisions of said special demurrer No. III be and the same are hereby sustained, to which ruling plaintiff excepted;

Whereupon the defendant- withdrew their 11th., 12th., 13th., 14th., 15th., and 17th., paragraphs or subdivisions of their said special demurrer No. III with the understanding with the Court and Counsel for plaintiff, that the defendants would urge the same question on the trial of the case under their general denial and special answer.

Thereupon came on to be heard the general demurrer of plaintiff to the answer of the defendants, and the same being considered.

It is hereby ordered, adjudged and decreed that said demurrer be and the same is hereby overruled, to which ruling the plaintiff excepted;

Whereupon the cause coming on for trial all of the parties, having waived a jury and submitted the issues of law as well as of fact to the court without a jury, and the Court having heard the evidence and argument of Counsel, and being fully advised, it is the opinion of the Court that the plaintiff, the State of Texas is only entitled to recover an amount equal to 169/365ths of one per cent. estimated and calculated upon the gross receipts of the defendants,
70 respectively, for the year ending June 30th. 1905, derived from the occupation of the transportation of passengers, freight, baggage, mail matter and express matter, and is not entitled to recover any penalties or forfeitures claimed herein;

It is therefore ordered, adjudged, and decreed that the plaintiff, the State of Texas, do have and recover of and from the defendant, the Galveston, Harrisburg & San Antonio Railway Company, the sum of Thirty Two Thousand Seven Hundred and Forty-three & 35/100 ($32,743.35) Dollars with interest thereon from date at the rate of six per centum per annum, and all costs of suit, for which let execution issue; from the defendant, the New York, Texas & Mexican Railway Company, the sum of Two Thousand Two Hundred and forty-two 80/100 ($2242.80) Dollars, with interest thereon from date at the rate of six per centum per annum, and all costs of suit, for which let execution issue; from the defendant, Gulf Western Texas & Pacific Railway Company, the sum of Six Hundred and Fifty-nine and 86/100 ($659.86) Dollars, with interest ther-on from date at the rate of six per centum per annum, and all costs of suit, for which let execution issue; from the defendant, Galveston, Houston & Northern Railway Company, the sum of Five Thousand Six Hundred and Ninety-five and 40/100 ($5,695.40) Dollars, with interest thereon from date at the rate of six per centum per annum, and all costs of suit, for which let execution issue;

It is further considered, ordered, adjudged and decreed, that the plaintiff, the State of Texas, take nothing by its suit for
71 penalties and forfeitures herein, and take nothing by its suit except the amount above adjudged to it, with interest thereon from this date and costs of suit; to which judgment of the Court, the Plaintiff, the State of Texas, in open court, excepted, and gave notice of appeal to the Court of Civil Appeals of the State of Texas for the 3rd. Supreme Judicial District; and to which judgment of the Court, the defendant in open court excepted, and gave notice of appeal to the Court of Civil Appeals of the State of Texas for the 3rd. Supreme Judicial District;

It is further ordered by the Court, at the request of all parties, that twenty days' time after the adjournment of the present term of this Court be allowed for preparation and filing of a statement of facts and bills of exception.

Conclusions of Law.

Filed December 12th, 1905.

No. 23356.

THE STATE OF TEXAS
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Suit Pending in the District Court of Travis County for the Twenty-sixth Judicial District of Texas.

In this case, the State of Texas, plaintiff, has sued the Texas & Pacific Railway Company, defendant, to recover of it certain taxes and penalties alleged to be due under the terms of Chapter 141 of the acts of the regular session of the Twenty Ninth Legis-
72 lature of the State of Texas, commonly known as the "Love Bill." I have rendered judgment for the plaintiff for the sum of $32,541.26. This sum represents 169/365 of such proportion of one per centum of the defendant's total gross receipts for the year ending June 30th., 1905, derived from its occupation, consisting in the transportation for hire of all commodities, as the length of its line of railroad within the State of Texas bears to the entire length of its line of railway. I have rendered judgment for the defendant, in so far as a recovery is sought by the plaintiff against it, for taxes calculated on its gross receipts from car rentals or from any other source, except receipts from the transportation of commodities, and in so far as a recovery of penalties is sought.

There are pending in this Court, sixteen other cases, all of which involve questions of law similar to the questions involved in this suit; and judgment has been rendered in each of them similar to the judgment which has been herein rendered. The plaintiff has requested that I file in all of said cases, the findings of fact and conclusions of law on which those judgments are predicated. A literal compliance with this request is impracticable, because of the short time remaining of the present term of court, the press of other business, and the voluminous nature of the facts in evidence, which differ in detail in each case. But as there is no issue of fact involved in any of said cases, and as the evidence in each of them shows without doubt or conflict, all of the facts necessary to the ascertainment of the proper amount for which judgment should be rendered,
73 no matter which of the conflicting theories of law, contended for by the various parties, should ultimately prevail; and as all of the cases have been decided in this court by the application of substantially similar principles of law, it is thought that the request will have been substantially complied with, if I state in this cause, the reasons which have induced me to render the judgment which has been rendered herein. I have, therefore, prepared and caused to be filed, the following conclusions of law, viz:—

Conclusions of Law.

1. The statute referred to is not, as a whole obnoxious to any provision of the Federal or State Constitutions, and is a valid law, except in certain particulars relating to penalties, and to the payment of taxes calculated on gross receipts derived from car and track rentals, which particulars will be hereinafter noticed. In cause No. 23,235, entitled the Texas & Pacific Railway Company *versus* John W. Stephens, *et al.*, my reasons for this conclusion were fully stated, and it is thought that no useful purpose would be subserved by repeating them here.

2. The statute imposes on the defendant an occupation tax of 169/365 of one per centum, to be calculated and estimated on the proportion of its annual gross receipts from transportation for the year ending June 30, 1905, mentioned therein, as its occupation tax for the last 169 days of the year 1905, and not a tax of one per centum thereon for said period, as contended for by the plaintiff. In cause No. 23,260 entitled the Paris & Great Northern Railway Company *versus* John W. Stephens *et al.*, my reasons for this conclusion have been stated; and as there stated, are hereby referred to and adopted as my reasons for the conclusion here stated.

74 3. The gross receipts of the defendant, for the year ending June the thirtieth, 1905, derived from car rentals and other sources, except transportation, are not to be taken into account in estimating the amount of its occupation tax. The purpose and intention of the Legislature in enacting the statute under consideration, was to impose an occupation tax on the business of transporting commodities by rail for hire. Such a tax can properly be calculated on, and proportioned to, the benefits derived by the carrier from the business taxed; and to proportion the tax to the receipts derived by the carrier from its occupation of transporting commodities, would be reasonably calculated to the attainment of this result. But such a tax cannot be, in whole or in part, made to depend on the amount of revenues derived by the carrier from other occupations in which it may happen to be engaged, or on its revenues from property which it may happen to own. The latter construction of the statute would render it obnoxious to that provision of Section 2 of Article VIII of the State Constitution which provides that "All occupation taxes shall be equal and uniform upon the same class of subjects, within the limits of the authority levying the tax." It would not be seriously contended that the legislature could constitutionally levy an occupation tax on lawyers, and make the amount to be paid an individual pursuing that occupation, dependant in whole or in part, on the amount he might annually receive from the rental of real estate or from the rental of law offices to other lawyers, or from the rental of his law library to another lawyer. Yet, the construction of the statute under consideration, as contended for by the State, would lead to exactly that result in principle.

75 There is another equally valid objection to that construction of the statute, in so far as it is attempted to collect there-

under, a tax from the defendant, calculated on its receipts derived from renting cars to other railway companies. The statute imposes an annual tax of one per centum, to be calculated and estimated on the gross receipts of the carrier. Section 11, of Chapter 148, of the acts of the regular session of the Twenty Ninth Legislature (known as the "Kenedy Bill") provides that:

"Every person, firm, joint stock association or corporation owning stock cars, refrigerator and fruit cars of any kind, tank cars of any kind, coal cars of any kind, furniture cars, or common box and flat cars, and leasing, renting, operating, hiring or charging mileage for the use if such cars, shall on or before the first day of April, and quarterly thereafter, through its superintendent or other chief officer, or authorized agent, file with the Comptroller of Public Accounts, a report under oath, showing the amount of gross receipts from such rentals or mileage, or other sources of revenue, for the preceding three months, and shall pay a tax of two per cent. on their gross receipts from all rentals or mileage, or other sources of revenue, received from any railway companies or other persons or from other sources within this State; provided, this shall not apply to the mileage and per diem paid by one railway company to another railway company within this State for the use of such cars. Said tax herein levied, shall be paid to the State Treasurer quarterly."

76 It will thus be seen that, for the occupation of renting or leasing cars, the two acts, when construed together, in effect provide that all persons, except railways, shall pay an amount equal to two per centum of the gross receipts derived therefrom, and that railways shall pay therefor, an amount equal to one per centum of the gross receipts so derived. It is within the constitutional power of the Legislature to classify occupations for the purpose of imposing occupation taxes. But the legislature has not the power, under the constitutional provision above quoted, to tax individuals of the same class, at different rates, for the privilege of pursuing the same occupation. The construction of the statute, contended for by the State, would lead to this result, in so far as it is sought to recover thereunder, taxes, calculated on gross receipts from car rentals.

5. The defendant, and each of the other carriers who are defendants in the above mentioned tax suits, have been at all times ready and willing to pay to the State, such taxes as may be finally determined to be legally due, by virtue of the facts alleged in the respective petitions of the plaintiff, and have in good faith and with all reasonable dispatch, resorted to the courts for the purpose of ascertaining the amount so due. The State has at all times insisted on the payment of each of said defendants, as the tax due for the last one hundred and sixty nine days of the year 1905, of a sum of money equal to full one per centum of the receipts on which such tax is to be estimated, and has in addition, insisted on including in such receipts, other receipts derived by the respective car-

77 riers from car rentals and track rentals. The State would at no time, have accepted a less sum, if same had been tendered, and said fact has at all times been known to the defendants. Each of the defendants learned of the judgment rendered by this Court

in the case of Paris & Great Northern Railway Company *versus* John W. Stephens, *et al.*, on the tenth day of November, except the Gulf, Colorado & Santa Fe Railway Company. The latter Company *learned of same on the eleventh day of November, 1905.* Except as otherwise shown by the evidence in certain of the cases mentioned, none of the said defendants have actually tendered to the State, any sum of money in payment of the taxes sued for, and none of them are, or have been, willing to pay to the State any sum on said account, until the issues herein involved shall have been finally terminated by the judgment of the court of last resort for said cases. Valid tenders of the amount actually due, have been made by certain of the defendants in said cases; and one of the defendants (The Texas Midland Railway Company) has been willing at all times, since the decision of said Paris & Great Northern case by this Court, to pay to the State the amount due by it, according to the rule therein announced, but has refrained from making a tender of said amount, because it knew that same would not be accepted. Reference is made to the records in said cases, respectively, for a statement of whether or not a tender was made therein, and if not made, for a statement of why same was not made.

On the question of whether or not any penalties should be recovered in this suit, I hold that where a statute imposes on a single and isolated class of tax payers a tax which can never be re-
78 covered back by judicial process if once paid, and a penalty of ten per centum of the amount due as taxes, and in addition, imposes a forfeiture of two hundred dollars per day (without reference to the amount of taxes due) on each tax payer belonging to such class for each day's delay in paying the tax after same falls due, and where the law does not impose like penalties on any other class of tax payers, such provision for the payment of penalties is void, when sought to be enforced pending a decision as to the validity of the tax law, against a tax payer, who in good faith and with reasonable dispatch resorts to the courts for the purpose of contesting the validity of the tax sought to be collected, because it not only denies to him the equal protection of the law but also denies to him in practical effect, the protection of the law, and closes to him the doors of the courts.

Having, for this reason, declined to render judgment against any of said defendants for penalties, it has in my opinion become immaterial whether or not there was such a tender in certain of the cases as would prevent the accruing of the penalties, even if that provision of the statute providing for penalties were valid.

V. L. BROOKS.

(Endorsed:) No. 23356. The State of Texas *vs.* The Texas & Pacific Ry. Co. Conclusions of law by the Court. Filed Dec. 12, 1905. Jas. P. Hart, Clerk.

79 *Statement of Facts.*

Filed January 3, 1906.

In the District Court of Travis County, Twenty-sixth Judicial District of Texas.

No. 23358.

THE STATE OF TEXAS
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY CO. ET AL.

Be it remembered, that on the trial of the above entitled and numbered cause, the following are the facts proven:—

Plaintiff's Evidence.

The State offers in evidence, certified copy of report made by the defendant, Galveston, Harrisburg & San Antonio Railway Company, to the Comptroller of Public Accounts of the State of Texas, as follows:—

"HOUSTON, TEXAS, *September* 26, 1905.

To the Comptroller of Texas:

Statement by the Galveston, Harrisburg & San Antonio Railway Company in Accordance with Chapter 141, Acts of the Twenty-ninth Legislature of the State of Texas, for the Year Ending June 30, 1905.

The length of the line of said railway, within and without the State of Texas, is 916.18 miles.

The length of the portion of said railway within the State
80 of Texas, is 916.18.

The gross receipts of said line of railway, from all sources whatsoever, for the year ending June 30th., 1905, were $7,472,458.47.

The term "Gross receipts," as used in this report, includes the following:

Receipts from inter-state traffic	$5,209,389.79
Receipts from intra-state traffic	1,578,744.11
Unapportioned:	
Mail	129,160.22
Express	78,752.93
Extra Baggage	18,068.56
Switching	57,673.09
Car service	293,792.73
Locomotive mileage	106,877.04
Total	$7,472,458.47

The above report is made under protest, said railway company reserving the right to contest the validity of the law herein referred to as contrary to, and in violation of, the Constitution of the United States, and of the State of Texas; this report being made without recognizing the right of the State of Texas to assess or collect said taxes, and without intending to pay same.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,
By THORNWELL FAY, *Vice President.*

THE STATE OF TEXAS, *Harris County:*

Thornwell Fay, being duly sworn, states that he is First Vice President of the Galveston, Harrisburg and San Antonio
81 Railway Company, with offices in Houston, Texas; that the statement made above, shows the entire mil-age of said railway, within and without the State of Texas, the number of miles within Texas, the gross receipts of said line of railway from all sources whatsoever within the time stated herein, and that said statement is true and correct.

THORNWELL FAY.

Sworn to and subscribed before me, this the 26th. day of September, 1905.

[SEAL.] C. C. BELK,
Notary Public, Harris County, Tex."

The State offers in evidence, certified copy of the assessment, made by the Comptroller of Public Accounts, against the defendant, Galveston, Harrisburg & San Antonio Railway Company, as follows:—

"STATE OF TEXAS, *County of Travis:*

I, J. W. Stephens, Comptroller of Public Accounts of the State of Texas, do hereby certify that the report which is hereto attached, of date 26th. day of September, 1905, was, on the 29th. day of September, A. D. 1905, filed in my office, and was on the 29th. day of September, A. D. 1905, accepted and approved by me; and that on that day, upon consideration of said report, I found that the Galveston, Harrisburg & San Antonio Railway Company owns, operates, manages and controls a line of railroad in the State of Texas for the transportation of passengers, freight and baggage, and that said line of railroad lies wholly within said State, and that its total gross
82 receipts from all sources whatsoever, for the year ending on the 30th. day of June, A. D. 1905, were $7,472,458.47 *dollars*; and that thereupon, on the 29th. day of September, A. D. 1905, I calculated, estimated and assessed at the sum of $74,724.58 *dollars*, the tax to be paid by said Galveston, Harrisburg & San Antonio Railway Company for the year 1905, under Chapter 141, Acts of the 29th. Legislature of the State of Texas, said tax being equal to one per centum of its gross receipts aforesaid.

Witness my hand and seal of office at Austin, Texas, this the 14th. day of November, A. D. 1905.

[SEAL.] J. W. STEPHENS,
Comptroller of Public Accounts of the State of Texas."

The State offers in evidence, certified copy of certificate made by the Comptroller of Public Accounts of the State of Texas, upon the above report of the defendant, Galveston, Harrisburg & San Antonio Railway Company, as follows:—

"I, J. W. Stephens, Comptroller of Public Accounts of the State of Texas, do hereby certify that Thornwell Fay, First Vice President of the Galveston, Harrisburg & San Antonio Railway Company, of Houston, Texas, has this day filed with this department, a report under oath, showing the gross receipts of said company from all sources whatsoever for the year ending June 30th, 1905, to be $7,472,458.47; and that the line of said railroad is wholly within the State of Texas. Said Company is therefore, indebted to the State of Texas in the sum of $74,724.58, as State occupation tax,
83 under the provisions of Chpater 141, Acts of the 29th. Legislature.

In testimony whereof, I hereto sign my name officially, and cause to be impressed hereon, the seal of this office, this the 29th. day of September, A. D. 1905.

[SEAL.] J. W. STEPHENS,
Comptroller."

The State offers in evidence, the request of the Comptroller of Public Accounts of the State of Texas, to the Attorney General of the State of Texas, to file suit against the defendant, Galveston, Harrisburg & San Antonio Railway Company as follows:—

"Hon. R. V. Davidson, Attorney General of the State of Texas, Austin, Texas.

DEAR SIR: You are hereby notified that the Galveston, Harrisburg & San Antonio Railway Company, a corporation owning, operating, managing and controlling a line of railroad in the State of Texas for the transportation of passengers, freight and baggage, did, by and through its First Vice President, Thornwell Fay, on the 26th. day of September, A. D. 1905, make under oath, as by law required, and on the 29th. day of September, A. D. 1905, filed in my office, its report of the gross receipts of such line of railroad from every source whatsoever, for the year ending on the 30th. day of June last preceding, and that subsequently, on the 29th. day of September, A. D. 1905, said report was accepted and approved by me; and that I thereupon, on that day duly calculated, estimated and as-
84 sessed at the sum of $74,724.50 *dollars*, the tax to be paid by said corporation for the year 1905, under the terms and provisions of Chapter 141, Acts of the 29th. Legislature of the State of Texas, said sum being equal to one per centum of such gross re-

ceipts; all as shown by and set forth in my certificate of filing calculation, estimation and assessment which is attached to said report.

A certified copy of said report is marked "Exhibit A," is hereto attached and is made part hereof, and also attached hereto, marked "Exhibit B" and made part hereof, is a certified copy of my said certificate of filing, calculation, estimation and assessment.

You are further notified that no tax, penalty or forfeiture prescribed by said statute, has been paid by said corporation.

You are therefore, hereby requested to bring suit in the name of the State of Texas, in Travis County, Texas, against the proper parties defendant and particularly against said corporation, to recover all taxes, penalties and forfeitures prescribed by said statute, for which said corporation is, or may become, liable in the premises.

Given under my hand and seal of office, on this the 14th. day of November, A. D. 1905.

[SEAL.] J. W. STEPHENS,
Comptroller of Public Accounts of the State of Texas."

85 The State offers in evidence, certified copy of report made by the defendant, New York, Texas & Mexican Railway Company, to the Comptroller of Public Accounts of the State of Texas, as follows:—

"HOUSTON, TEXAS, *September 26th*, 1905.

To the Comptroller of Texas:

Statement by the New York, Texas & Mexican Railway Company in Accordance with Chapter 141, Acts of the 29th Legislature of the State of Texas, for the Year Ending June 30th, 1905.

The length of the line of said railway, within and without the State of Texas, is 176.71 miles.

The length of the portion of said railway, within the State of Texas, is 176.71 miles.

The gross receipts of said line of railway, from all sources whatsoever, for the year ending June 30th., 1905, were $509,458.17.

The term "gross receipts," as used in this report, includes the following:—

Receipts from inter-state traffic	$181,020.80
Receipts from intra-state traffic	281,556.09
Unapportioned:	
Mail	12,019.87
Express	8,012.80
Extra Baggage	1,199.12
Switching	586.75
Car service	21,626.76
Locomotive mil-age	3,435.98
Total	$509,458.17

86 The above report is made under protest, said railway company reserving the right to contest the validity of the law herein referred to, as contrary to and in violation of, the Constitution of the United States and of the State of Texas; this report being made without recognizing the right of the State of Texas to compel the making thereof, and without recognizing the right of the State of Texas to assess or collect said taxes, and without intending to pay same.

NEW YORK, TEXAS & MEXICAN
RAILWAY COMPANY,
By THORNWELL FAY, *President.*

THE STATE OF TEXAS, *Harris County:*

Thornwell Fay, being duly sworn, states that he is President of the New York, Texas & Mexican Railway Company, with offices in Houston, Texas; that the statement made above, shows the entire mil-age of said railway, within and without the State of Texas, the number of miles within Texas, the gross receipts of said line of railway from all sources whatsoever within the time stated herein, and that said statement is true and correct.

THORNWELL FAY.

Sworn to and subscribed before me, this the 26th. day of September, 1905.

[SEAL.] C. C. BELK,
Notary Public, Harris County, Texas."

The State offers in evidence, certified copy of the assessment, made by the Comptroller of Public Accounts, against the defendant,
87 New York, Texas & Mexican Railway Company, as follows:—

"STATE OF TEXAS, *County of Travis:*

I, J. W. Stephens, Comptroller of Public Accounts of the State of Texas, do hereby certify that the report which is hereto attached, of date the 26th. day of September, 1905, was, on the 29th. day of September, A. D. 1905, filed in my office, and was on the 29th. day of September, A. D. 1905, accepted and approved by me; and that on that day, upon consideration of said report, I found that the New York, Texas & Mexican Railway Company owns, operates, manages and controls a line of railroad in the State of Texas for the transportation of passengers, freight and baggage; and that said line of railroad lies wholly within this State, and that its total gross receipts from all sources whatsoever, for the year ending on the 30th. day of June, A. D. 1905, were $509,458.17 *dollars*; and that thereupon, on the 29th. day of September, A. D. 1905, I calculated, estimated and assessed at the sum of $5,094.58 *dollars*, the tax to be paid by said New York, Texas & Mexican Railway Company for the year 1905, under Chapter 141, Acts of the 29th. Legislature of the State of Texas, said tax being equal to one per centum of its gross receipts aforesaid.

Witness my hand and seal of office, at Austin, Texas, this the 14th. day of November, A. D. 1905.

[SEAL.] J. W. STEPHENS,
Comptroller of Public Accounts of the State of Texas."

88 The State offers in evidence, certified copy of certificate made by the Comptroller of Public Accounts of the State of Texas, upon the above report of the defendant, New York, Texas & Mexican Railway Company, as follows:—

" I, J. W. Stephens, Comptroller of Public Accounts of the State of Texas, do hereby certify that Thornwell Fay, President of the New York, Texas & Mexican Railway Company, of Houston, Texas, has this day filed with this department, a report under oath, showing the gross receipts of said company from all sources whatsoever, for the year ending June 30th., 1905, to be $509,458.17; that the line of said railroad is wholly within the State of Texas. Said Company is therefore indebted to the State of Texas in the sum of $5,094.58 as State occupation tax, under the provisions of Chapter 141, Acts of the 29th. Legislature.

In testimony whereof, I hereby sign my name officially, and cause the seal of this office to be impressed hereon, this the 29th. day of September, A. D. 1905.

[SEAL.] J. W. STEPHENS,
Comptroller.

Said report is filed under protest."

The State offers in evidence the request of the Comptroller of Public Accounts of the State of Texas, to the Attorney General of the State of Texas, to file suit against the defendant, New York, Texas & Mexican Railway Company, as follows:—

89 " Hon. R. V. Davidson, Attorney General of the State of Texas, Austin, Texas.

DEAR SIR: You are hereby notified that the New York, Texas & Mexican Railway Company, a corporation owning, operating, managing and controlling a line of railroad in the State of Texas for the transportation of passengers, freight and baggage, did, by and through its President, Thornwell Fay, on the 26th. day of September, A. D. 1905, make under oath, as by law required, and on the 29th. day of September, A. D. 1905, file in my office, its report of the gross receipts of such line of railroad from every source whatsoever, for the year ending on the 30th. day of June last preceding; and that subsequently, on the 29th. day of September, A. D. 1905, said report was accepted and approved by me; and that I thereupon, on that day duly calculated, estimated and assessed at the sum of $5,094.58 dollars, the tax to be paid by said corporation for the year 1905, under the terms and provisions of Chapter 141, Acts of the 29th. Legislature of the State of Texas, said sum being equal to one per centum of such gross receipts; all as shown by and set forth in my certificate of filing, calculation, estimation and assessment, which is attached to said report.

A certified copy of said report is marked "Exhibit A," is hereto attached and is made part hereof; and also attached hereto, marked "Exhibit B," and made part hereof, is a certified copy of
90 my said certificate of filing, calculation, estimation and assessment.

You are further notified that no tax, penalty or forfeiture prescribed by said statute, has been paid by said corporation.

You are therefore, hereby requested to bring suit in the name of the State of Texas, in Travis County, Texas, against the proper parties defendant, and particularly against said corporation, to recover all taxes, penalties and forfeitures prescribed by said statute, for which said corporation is, or may become, liable in the premises.

Given under my hand and seal of office, this the 14th. day of November, A. D. 1905.

[SEAL.] J. W. STEPHENS,
Comptroller of Public Accounts of the State of Texas."

The State offers in evidence certified copy of report made by defendant, Gulf, Western Texas & Pacific Railway Company to the Comptroller of Public Accounts of the State of Texas, as follows:—

"HOUSTON, TEXAS, *September* 26, 1905.

To the Comptroller of Texas:

Statement by the Gulf, Western Texas & Pacific Railway Company in Accordance with Chapter 141, Acts of the Twenty-ninth Legislature of the State of Texas, for the Year Ending June 30th, 1905.

The length of the line of said railway, within and without the State of Texas, is 111.42 miles.

91 The length of the portion of said Railway, within the State of Texas, is 111.42 miles.

The gross receipts of said line of railway, from all sources whatsoever, for the year ending June 30th. 1905, were $155,511.01.

The term "gross Receipts," as used in this report, includes the following:—

Receipts from inter-state traffic	$31,121.81
Receipts from intra-state traffic	98,142.32
Unapportioned:	
Mail	5,371.17
Express	5,984.30
Extra baggage	841.33
Switching	1,056.15
Car Service	11,155.43
Locomotive mil-age	1,838.50
Total	$155,511.01

The above report is made under protest, said railway company reserving the right to contest the validity of the law herein referred to, as contrary to and in violation of the Constitution of the United States and of the State of Texas; this report being made without recognizing the right of the State of Texas to compel the making thereof, and without recognizing the right of the State of Texas to assess or collect said taxes, and without intending to pay same.

GULF, WESTERN TEXAS &
PACIFIC RY. CO.,
By THORNWELL FAY,
President.

92 THE STATE OF TEXAS, *Harris County:*

Thornwell Fay, being duly sworn, says that he is President of the Gulf, Western Texas & Pacific Railway Company, with offices in Houston, Texas; that the statement made above shows the entire mileage of said railway, within and without the State of Texas, the number of miles within Texas, the gross receipts of said line of railway from all sources whatsoever within the time stated herein, and that said statement is true and correct.

THORNWELL FAY.

Sworn to and subscribed before me, this the 26th day of September, 1905.

[SEAL.] C. C. BELK,
Notary Public, Harris County, Texas."

The State offers in evidence certified copy of the assessment, made by the Comptroller of Public Accounts of the State of Texas, against the defendant, Gulf, Western Texas & Pacific Railway Company, as follows:

"STATE OF TEXAS, *County of Travis:*

I, J. W. Stephens, Comptroller of Public Accounts of the State of Texas, do hereby certify that the report which is hereto attached, of date 26th. day of September, 1905, was, on the 30th. day of September, A. D. 1905, filed in my office, and was, on the 30th. day of September, A. D. 1905, accepted and approved by me; and that on that day, upon consideration of said report, I found that the
93 Gulf, Western Texas & Pacific Railway Company owns, operates, manages and controls a line of railroad in the State of Texas for the transportation of passengers, freight and baggage, and that said line of railroad lies wholly within said state, and that its total gross receipts from all sources whatsoever, for the year ending on the 30th. day of June, A. D. 1905 were $155,511.01 dollars; and that thereupon, on the 30th. day of September, A. D. 1905, I calculated, estimated and assessed at the sum of $1,555.11 dollars, the tax to be paid by said Gulf, Western Texas & Pacific Railway Company for the year 1905, under Chapter 141, Acts of the 29th. legis-

lature of the State of Texas, said tax being equal to one per centum of its gross receipts aforesaid.

Witness my hand and seal of office at Austin, Texas, this the 14th. day of November, A. D. 1905.

[SEAL.] J. W. STEPHENS,
Comptroller of Public Accounts of the State of Texas."

The State offers in evidence, certified copy of certificate made by the Comptroller of Public Accounts of the State of Texas, upon the above report of the defendant, Gulf, Western Texas, & Pacific Railway Company, as follows:—

"I, J. W. Stephens, Comptroller of Public Accounts of the State of Texas, do hereby certify that Thornwell Fay, President of the Gulf, Western Texas & Pacific Railway Company, of Houston,
94 Texas, has filed with this department, a report under oath, for the year ending June 30th., 1905, to be $155,511.01; that said line of railroad is wholly within the State of Texas.

Said company is therfore indebted to the State of Texas, in the sum of $1,555.11, as State occupation tax under the provisions of Chapter 141, Acts of the 29th. Legislature.

In testimony whereof, I hereto set my hand and cause the seal of this office to be affixed, this the 30th. day of September, 1905.

[SEAL.] J. W. STEPHENS,
Comptroller.

Said report is made under protest."

The State offers in evidence, the request of the Comptroller of Public Accounts of the State of Texas, to the Attorney General of the State of Texas, to file suit against the defendant, Gulf, Western Texas & Pacific Railway Company, as follows:—

"Hon. R. V. Davidson, Attorney General of the State of Texas, Austin, Texas.

DEAR SIR: You are hereby notified that the Gulf, Western Texas And Pacific Railway Company, a corporation owning, operating, managing and controlling a line of railroad in the State of Texas for the transportation of passengers, freight and baggage, did, by and through its president, Thornwell Fay, on the 26th. day of September, A. D. 1905, make under oath, as by law required,
95 and on the 30th. day of September, A. D. 1905, file in my office, its report of the gross receipts of such line of railroad from every source whatsoever, for the year ending on the 30th. day of June last preceding; and that subsequently, on the 30th. day of September, A. D. 1905, said report was accepted and approved by me, and that I thereupon, on that day duly calculated, estimated and assessed at the sum of $1,555.11 dollars, the tax to be paid by said corporation for the year 1905, under the terms and provisions of Chapter 141, Acts of the 29th. Legislature of the State of Texas, said sum being equal to one per centum of such gross receipts; all

as shown by and set forth in my certificate of filing, calculation, estimation and assessment, which is attached to said report.

A certified copy of said report is marked "Exhibit A," is hereto attached, and is made part hereof; and also attached hereto, marked "Exhibit B," and made part hereof, is a certified copy of my said certificate of filing, calculation, estimation and assessment.

You are further notified that no tax, penalty or forfeiture prescribed by said statute, has been paid by said corporation.

You are therefore, hereby requested to bring suit in the name of the State of Texas, in Travis County, Texas, against the proper parties defendant, and particularly against said corporation, to recover all taxes, penalties and forfeitures prescribed by said statute, for which said corporation is, or may become, liable in the premises.

Given under my hand and seal of office, on this the 14th.
96 day of November, A. D. 1905.

[SEAL.] J. W. STEPHENS,
Comptroller of Public Accounts of the State of Texas."

The State offers in evidence, certified copy of report made by the defendant, Galveston, Houston & Northern Railway Company, to the Comptroller of Public Accounts as follows:—

"HOUSTON, TEXAS, *September 26th*, 1905.

To the Comptroller of Texas:

Statement by the Galveston, Houston & Northern Railway Company in Accordance with Chapter 141, Acts of the Twenty-ninth Legislature of the State of Texas, for the Year Ending June 30th, 1905.

The length of the line of said railway, within and without the State of Texas, is 54.20 miles.

The length of the portion of said railway, within the State of Texas is 54.20 miles.

The gross receipts of said line of railway, from all sources whatsoever, for the year ending June 30th, 1905, were $1,248,117.47.

The term "gross receipts," as used in this report, includes the following:—

97	Receipts from inter-state traffic	$946,057.49
	Receipts from intra-state traffic	252,514.95
	Unapportioned:	
	Mail	6,475.28
	Express	5,840.13
	Extra baggage	1,049.35
	Switching	18,132.75
	Car service	14,717.12
	Locomotive mil-age	3,330.40
	Total	$1,248,117.47

The above report is made under protest, said railway company reserving the right to contest the validity of the law herein referred to, as contrary to, and in violation of, the Constitution of the United States and of the State of Texas; this report being made without recognizing the right of the State of Texas to compel the making thereof, and without recognizing the right of the State of Texas to assess or collect said taxes, and without intending to pay same.

GALVESTON, HOUSTON & NORTHERN RAILWAY COMPANY,
By THORNWELL FAY, *First Vice President.*

THE STATE OF TEXAS, *Harris County:*

Thornwell Fay, being duly sworn, states that he is First Vice president of the Galveston, Houston & Northern Railway Company, with offices in Houston, Texas; that the statement made above, shows the entire mil-age of said railway, within and without the State of Texas, the number of miles within Texas, the gross receipts of
98 said line of railway from all sources whatsoever, within the time stated herein, and that said statement is true and correct.

THORNWELL FAY.

Sworn to and subscribed before me, this the 26th. day of September, 1905.

[SEAL.]

C. C. BELK,
Notary Public, Harris County, Texas."

The State offers in evidence, certified copy of the assessment made by the Comptroller of Public Accounts of the State of Texas, against the defendant, Galveston, Houston, & Northern Railway Company, as follows:—

"STATE OF TEXAS, *County of Travis:*

I, J. W. Stephens, Comptroller of Public Accounts of the State of Texas, do hereby certify that the report which is hereto attached of date 26th. day of September, 1905, was, on the 29th. day of September, A. D. 1905, filed in my office, and was, on the 29th. day of September, A. D. 1905, accepted and approved by me; and that on that day, upon consideration of said report, I found that the Galveston, Houston & Northern Railway Company owns, operates, manages and controls a line of railroad in the State of Texas for the transportation of passengers, freight and baggage, and that said line of railroad lies wholly within said State, and that its total gross receipts from all sources whatsoever, for the year ending on the 30th. day of June, A. D. 1905, were $1,248,117.47 dollars; and that, there-
99 upon, on the 29th. day of September, A. D. 1905, I calculated, estimated and assessed at the sum of $12,481.17 dollars, the tax to be paid by said Galveston, Houston & Northern Railway Company for the year 1905, under Chapter 141, Acts of the 29th. Legislature of the State of Texas, said tax being equal to one per centum of its gross receipts aforesaid.

Witness my hand and seal of office at Austin, Texas, this the 14th. day of November, A. D. 1905.

[SEAL.] J. W. STEPHENS,
Comptroller of Public Accounts of the State of Texas."

The State offers in evidence certified copy of certificate made by the Comptroller of Public Accounts of the State of Texas, upon the above report of the defendant, Galveston, Houston & Northern Railway Company, as follows:—

"I, J. W. Stephens, Comptroller of Public Accounts of the State of Texas, do hereby certify that Thornwell Fay, First Vice President of the Galveston, Houston & Northern Railway Company, of Houston, Texas, has this day filed with this department, a report under oath, showing the gross receipts of said company from all sources whatsoever for the year ending June 30th, 1905, to be $1,248,117.47; and that the line of said railroad is wholly within the State of Texas. Said Company is therefore indebted to the State of Texas in the sum of $12,481.17, as State tax under the provisions of Chapter 141, Acts of the 29th. Legislature.

In testimony whereof, I hereby sign my name officially, and cause the seal of this office to be impressed hereon, this the 29th.
100 day of September, A. D. 1905.

J. W. STEPHENS,
Comptroller."

Said report is made under protest.

The State offers in evidence, the request of the Comptroller of Public Accounts of the State of Texas, to the Attorney General of the State of Texas, to file suit against the defendant, Galveston, Houston & Northern Railway Company, as follows:—

"Hon. R. V. Davidson, Attorney General of the State of Texas, Austin, Texas.

DEAR SIR: You are hereby notified that the Galveston, Houston & Northern Railway Company, a corporation owning, operating, managing and controlling a line of railroad in the State of Texas for the transportation of passengers, freight and baggage, did, by and through its First Vice President, Thornwell Fay, on the 26th. day of September, A. D. 1905, make under oath as by law required, and on the 29th. day of September, A. D. 1905, file in my office, its report of the gross receipts of such line of railroad from every source whatsoever, for the year ending on the 30th. day of June last preceding, and that subsequently, on the 29th. day of September, A. D., 1905, said report was accepted and approved by me; and that I thereupon on that day duly calculated, estimated and assessed at
101 the sum of $12,481.17 *dollars*, the tax to be paid by said corporation for the year 1905, under the terms and provisions of Chapter 141, Acts of the 29th. Legislature of the State of Texas, said sum being equal to one per centum of such gross receipts; all as shown by and set forth in my certificate of filing, calculation, estimation and assessment, which is attached to said report.

A Certified copy of said report is marked "Exhibit A," is hereto attached, and is made part hereof; and also attached hereto, marked "Exhibit B," and made part hereof, is a certified copy of my said certificate of filing, calculation, estimation and assessment.

You are further notified that no tax, penalty or forfeiture prescribed by said Statute, has been paid by said corporation.

You are therefore, hereby requested to bring suit in the name of the State of Texas, in Travis County, Texas, against the proper parties defendant, and particularly against said corporation, to recover all taxes, penalties and forfeitures prescribed by said statute, for which said corporation is, or may become, liable in the premises.

Given under my hand and seal of office, this the 14th. day of November, A. D. 1905.

[SEAL.] J. W. STEPHENS,

Comptroller of Public Accounts of the State of Texas."

The State offers in evidence, the special laws with regard
102 to the incorporation of the Texas & Pacific Railway Company and its predecessors, which will appear set out in full in defendant's evidence.

The State offers in evidence, certified copies of the minutes of the board of directors of the Texas & Pacific Railway Company, of their meetings, held on the fourth and fifth days of June, 1873, reciting the acceptance of the terms of the act of May 2nd, 1873, of the Legislature of the State of Texas, both by telegram and formal acceptance, said copy of minutes being now on file in the office of the Secretary of the State of Texas.

The State offers in evidence, so much of the answer of the Texas & Pacific Railway Company, filed in cause No. 23,356 The State of Texas *versus* the Texas & Pacific Railway Company, in the District Court of Travis County, Texas, which sets out that said Texas & Pacific Railway Company had only received land from the State of Texas for about four hundred and two miles of railroad actually constructed.

It was admitted in open Court that the defendant, Galveston Harrisburg & San Antonio Railway Company, the defendant, New York, Texas & Mexican Railway Company, the defendant, Gulf Western Texas & Pacific Railway Company, and the defendant Galveston, Houston & Northern Railway Company, had paid
103 no part of the taxes, prescribed by Chapter 141 of the Acts of the Twenty Ninth Legislature of Texas.

Plaintiff rests.

104 *Defendant's Evidence.*

Defendant offers in evidence, the following agreement, to-wit:

In the District Court of Travis County, Twenty-sixth Judicial District.

"No. 23354.

THE STATE OF TEXAS
versus
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY.

For the purpose of avoiding labor and expense, and to facilitate the trial of the above entitled cause, and other causes heretofore filed by the Attorney General against the several railroad companies named in the signatures hereunto attached, in which causes the State of Texas sues for taxes, penalties and forfeitures, it is hereby agreed by and among the respective attorneys of record for said railroad companies aforesaid, and said Attorney General, as follows:

1. That the Atchison, Topeka & Santa Fe Railway Company was incorporated under the laws of the State of Kansas; that the Texas & Pacific Railway Company was incorporated under an Act of Congress, approved March 3, 1871, and acts amendatory thereof; and that the Texas & Pacific Railway Company, by resolutions duly adopted by its board of directors on the third and fourth days of June 1873, a copy of which resolutions duly signed by its president and attested by its secretary and its corporate seal, was duly filed by said corporation in the office of the Secretary of State of Texas on the 18th day of June, 1873, did duly accept the terms and
105 provisions of the special law affecting said corporation, passed May 2, 1873, and mentioned in plaintiff's petition against that corporation, referred to in this agreement, so far as it could legally do so by resolution. That all the other defendant corporations aforesaid were incorporated under the laws of the State of Texas. That all of the defendants aforesaid were incorporated prior to June 30, 1904, and continuously since and prior to that date, have respectively owned, leased, operated, managed and controlled the several lines of railroad mentioned in plaintiff's petitions, respectively, and in their answers, respectively; and said railroad companies have, at all of said times, been common carriers of passengers, freight, baggage, mail and express, and as such have been engaged in both intrastate and interstate, and also in foreign and international transportation; and that the number of miles of railway owned, leased and operated within and without the State of Texas by the respective railroad companies aforesaid, is correctly shown by their respective reports heretofore made to the Comptroller of Public Accounts of said State, as alleged in said petitions respectively, and as shown by the answer filed on behalf of each defendant, respectively, and said lines of railroad, respectively, are correctly described in said answers respectively.

2. That said railroad companies, respectively, filed with John W. Stephens, Comptroller of Public Accounts of the State of Texas, reports of their gross receipts for the year ending June 30, 1905.

3. That each of said reports comprises data from the records of the company in behalf of which each report was filed; that the officer of each of said companies, having knowledge of the facts,
106 would if present and testifying as a witness, testify to the correctness of all of the details and statements contained in said reports as the same are therein presented, and that certified copies of said reports, in respect to all of the matters therein contained, shall be received in evidence with the same force and effect as if the persons cognizant of the facts were personally present and testifying ther-to.

4. That each of the companies mentioned in the certificate of the Secretary of State of the State of Texas, hereto annexed and marked "Exhibit A," and made a part hereof, has paid the franchise tax imposed upon it by an act of the Legislature approved March 1, 1905, as the same appears in the Acts of the Twenty-ninth Legislature, shapter 19, page 21, the amounts paid by the several companies being shown in said certificate.

5. That each of the railroad companies mentioned in the certificate of the Comptroller of Public Accounts, of the State of Texas, dated October 9, 1905, hereto annexed, marked "Exhibit B," and made a part hereof, paid a tax of one per cent. on its gross receipts derived from passenger travel within the State of Texas for the year beginning June 30, 1904, and ending June 30, 1905, the amounts paid by said companies, respectively being as shown in said exhibit.

6. That each of said railroad companies, as alleged in answer filed in this and said companion cases referred to, has rendered for taxation in all of the counties, cities, towns, villages and school districts, through which its lines of railroad extend, and in which it owns property, for State, county, municipal and school purposes, all of its property, real and personal, subject to taxation under
107 the laws of the State of Texas; that, in each instance, the property rendered for taxation was duly assessed by the proper assessing officer; and that, in each instance, the valuation placed upon said property so rendered and assessed was equalized and approved by the proper legal board of equalization, the amounts of the renditions and assessments as equalized and approved being as alleged in said answers respectively; that each of said companies has paid all of the taxes upon all of its property, including rolling stock so rendered, assessed, equalized and approved, for all the years, excepting the year 1905, for which the taxes are not yet delinquent, and will pay the taxes for the year 1905 within the time allowed by law, all taxes paid having been duly and legally levied; that all of the other property owners in the various counties, cities, towns, villages and school districts in which the property owned by said railroad companies, and rendered, assessed, equalized and approved, as aforesaid, have, during the same period of time, rendered all of their property for taxation, and the same has been duly assessed in each instance by the proper assessing officer, and the valuation of same has

in each instance been duly equalized and approved by the proper and legal board of equalization; and that, by virtue of the actions and proceedings of assessing officers and boards of equalization, the value of all of the property of said railroad companies and the value of all of the property of the said other taxpayers, lying in the same counties, cities, towns, villages and school districts, have been fixed,
108 determined and established for the purpose of ad valorem taxation.

7. That if the defendants, or any of them, had at any time on or since October 1, 1905, tendered, or should now tender, to the Treasurer of the State of Texas, as the tax prescribed by chapter 141 of the Acts of the Twenty-ninth Legislature of Texas, to be paid by such defendant during the year 1905, an amount less than an amount equal to one per centum of the gross receipts of such defendant from every source whatsoever, for the year ending on the 30th. day of June, 1905, the tender aforesaid would have been, and would now be refused by said State Treasurer, as the contention of the State has been, and is, that each of said defendants should pay as such tax for the year 1905 an amount equal to one per centum of its gross receipts from every source whatsoever, for the year ending on June 30, 1905.

9. That this agreement shall not preclude any of the parties aforesaid from proving any fact legally admissible as evidence, in addition to the matters embraced in this agreement.

10. This agreement is limited to the purposes of these cases.

TEXAS & PACIFIC RAILWAY COMPANY,
CHICAGO, ROCK ISLAND & GULF RAILWAY COMPANY,
FORT WORTH & DENVER CITY RAILWAY COMPANY,
TEXAS MIDLAND RAILROAD,
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,
NEW YORK, TEXAS & MEXICAN RAILWAY COMPANY,
GULF, WEST TEXAS & PACIFIC RAILWAY COMPANY,
GALVESTON, HOUSTON & NORTHERN RAILWAY COMPANY,
GALVESTON, HOUSTON & HENDERSON RAILWAY COMPANY OF 1882,
HOUSTON & TEXAS CENTRAL RAILROAD COMPANY,
INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY,
109 TEXAS & NEW ORLEANS RAILROAD COMPANY,
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS,

HOUSTON EAST & WEST TEXAS RAILWAY COMPANY,
GULF, COLORADO & SANTA FE RAILWAY COMPANY,
THE SOUTHERN KANSAS RAILWAYCOMPANY OF TEXAS,
THE PECOS & NORTHERN TEXAS RAILWAY COMPANY,
CANE BELT RAILROAD COMPANY,
RIO GRANDE & EAGLE PASS RAILROAD COMPANY,
SAN ANTONIO & ARANSAS PASS RAILROAD COMPANY,
FORT WORTH & RIO GRANDE RAILWAY COMPANY,
ST. LOUIS, SAN FRANCISCO & TEXAS RAILWAY COMPANY,
ST. LOUIS, BROWNSVILLE & MEXICAN RAILWAY COMPANY,
By T. J. FREEMAN,
Attorney for the Texas & Pacific Railway Company and for All Attorneys Representing Other Lines.
R. V. DAVIDSON, *Attorney General,*
W. E. HAWKINS,
Assistant Attorney General, for Plaintiff."

Defendant also offers in evidence "Exhibit A" to the preceding agreement, as follows:

"THE STATE OF TEXAS,
DEPARTMENT OF STATE.

I, O. K. Shannon, Secretary of State of the State of Texas, do hereby certify that the following corporations have paid the franchise to this department for the year beginning May 1, 1905, and ending May 1, 1906, in the amounts set opposite their respective names.

110

Folio.		Name.	Amount of franchise tax.
465	C	Galveston, Harrisburg & San Antonio Railway Company	$932.00
459	C	New York, Texas & Mexican Railway Company	190.00
458	C	Gulf, West Texas & Pacific Railway Company	630.00
422	D	Galveston, Houston & Northern Railway Company	90.00

In testimony whereof, I have hereto signed my name officially and have caused to be impressed hereon the seal of State at
111 my office in the city of Austin, Texas, this the 9th. day of October, A. D. 1905.

[SEAL.]

"O. K. SHANNON,
Secretary of State."

Defendant also offers in evidence "Exhibit B," attached to the said agreement, as follows:

COMPTROLLER'S OFFICE.

I, J. W. Stephens, Comptroller of Public Accounts of the State of Texas, do hereby certify that the records of this office show that the following named railroad companies made reports of their gross receipts from their passenger travel within this State, and paid the tax of one per cent. (1%) thereon for the time from July 1, 1904, to June 30, 1905, both dates inclusive, in the respective amounts stated opposite the name of each of said companies, to-wit:

Name of company.	Gross passenger receipts.	Tax of 1%.
Cane Belt	$45,900.30	$459.00
Chicago, Rock Island & Gulf	100,675.76	1,006.76
Fort Worth & Denver City	407,240.60	4,072.41
Fort Worth & Rio Grande	133,037.49	1,330.38
Galveston, Harrisburg & San Antonio	565,651.52	5,656.52
Galveston, Houston & Henderson	97,088.14	970.88
Galveston, Houston & Northern	89,788.57	897.88
Gulf, Colorado & Santa Fe	1,004,379.72	10,043.80
Gulf, West Texas & Pacific	48,723.95	487.22
Houston East & West Texas	237,992.28	2,379.92
Houston & Texas Central	1,110,341.82	11,103.41
Missouri, Kansas & Texas of Texas	1,546,640.08	15,466.39
112		
New York, Texas & Mexican	101,108.11	1,011.06
St. Louis Southwestern of Texas	532,043.32	5,320.44
San Antonio & Aransas Pass	550,472.33	5,504.71
St. Louis, San Francisco & Texas	25,197.95	251.97
St. Louis, Brownsville & Mexico	50,089.06	500.89
Texas Central	204,331.54	2,043.31
Texas Midland	121,013.35	1,210.13
Texas & New Orleans	485,675.77	4,856.76
Texas & Pacific	1,358,973.73	13,589.74
Pecos & Northern Texas	18,949.28	189.49
Southern Kansas Railway Company of Texas	17,281.00	172.81
Rio Grande & El Paso	2,135.25	21.36
International & Great Northern	1,012,902.72	10,129.03

In testimony whereof, I hereto sign my name officially, and cause the seal of office to be impressed hereon, this the 9th. day of October, A. D. 1905.

[SEAL.] J. W. STEPHENS,
Comptroller."

It is agreed that the certified copies of reports to the Comptroller of Public Accounts, offered in evidence by the plaintiff, are the certified copies referred to in the above agreement, offered by the defendant.

Defendant offers in evidence the affidavits of C. C. Barry, C. C. Gibbs, M. A. Westcott, C. R. Cottingham, L. J. Cox. John E. O'Neil and C. K. Dunlap, as follows:

"I, C. C. Barry, state upon oath that I am the auditor of the Houston & Texas Central Railroad Company, and of the Houston East & West Texas Railway Comany. That as such, I am
113 the custodian of the books and accounts of the said Houston & Texas Central Railroad Company and of the Houston East & West Texas Railway Company. That I am personally cognizant therefrom of the amounts of the gross receipts of said companies, as set forth in the answers of said companies, respectively, and in their special reports made to the Comptroller of the State of Texas, copies whereof are attached to defendant's answers, respectively. That the amounts of said gross receipts of said companies, respectively, for the year beginning June 30, 1904, and ending June 30, 1905, as therein stated, are correct. That the words 'receipts from interstate traffic,' as therein stated, include also receipts from international and foreign traffic as well as traffic between the States. That under the head 'unapportioned' in each of said reports, as well as in said answers, are included receipts from the items mail, express, extra baggage, switching, car service and locomotive mileage. That the books of each of said defendant companies are so kept that there is no apportionment of the State and interstate and international traffic, except as to freight and passenger earnings, respectively: That the said items included under the term 'unapportioned,' as above stated, are not divided between the State and interstate receipts, and are not so entered upon the books. That said items are incapable of a correct apportionment. That under the item mail is included compensation for transportation of the United States mail, both between points wholly within the State of Texas and to and from points without the State of Texas, and it is impossible to apportion such receipts. That the item express, includes
114 moneys paid to each of said companies by express companies for the transportation of express matter. That the item express can not be by said railroad companies divided between the State and interstate traffic, for the reason that the original transportation is made by the express company and the railroad companies have no knowledge of the individual shipments. That the item extra baggage is susceptible of apportionment, but it has not been heretofore apportioned by these companies. That the items switching car service and locomotive mileage, are incapable of exact apportionment, and any division thereof into State and interstate receipts must necessarily be a purely arbitrary division. That the passenger receipts for the quarter ending September 30, 1905, from points wholly within the State of Texas, are as alleged in the answers, respectively, of said companies, and that the amounts therein alleged to have been paid as a tax on passenger receipts, for the year ending June 30, 1905, and for franchise taxes, are correctly alleged in the answers of each of said companies respectively."

"I, C. C. Gibbs, state upon oath, that I am the tax agent of the Houston & Texas Central Railroad Company; that the railroad of

said company extends through and is operated in the following counties of said State, towit: Bastrop, Brazos, Burnet, Collin, Dallas, Ellis, Falls, Fayette, Freestone, Grayson, Grimes, Harris, Llano, Lampasas, Lee, Limestone, McLennan, Navarro, Robertson, Tarrant, Travis, Waller, Washington, and Williamson. And that said railroad extends through, and is operated in the following named cities and towns, incorporated either by special law or under the
115 general laws of the State of Texas providing for the incorporation of cities containing one thousand inhabitants or over, under the provision of chapters 1 to 10 of title 18 of the Revised Civil Statutes of the State of Texas, towit, the cities of: Austin, Brenham, Bryan, Burnet, Calvert, Dallas, Denison, Elgin, Ennis, Ferris, Fort Worth, Giddings, Groesbeeck, Hearne, Hempstead, Houston, Houston Heights, Howe, Kosse, Llano, Lampasas, Mansfield, Marlin, McKinney, Mexia, Midlothian, Navasota, Palmer, Plano, Sherman, Thornton, Van Alstyne, Waco, Waxahachie and Corsicana."

"I, M. A. Westcott, state upon oath, that I am the tax agent of the Houston East and West Texas Railway Company; that the railway of said company extends through and is operated in the following counties of said State, towit: Harris, Montgomery, Liberty, San Jacinto, Polk, Angelina, Nacogdoches and Shelby, and into and through the following cities and towns, incorporated either by special law or under the general laws of the State of Texas providing for the incorporation of cities containing one thousand inhabitants or over, under the provisions of chapter 1 to 10 of title 18 of the Revised Civil Statutes of the State of Texas, towit: The cities of Houston, Lufkin, Nacogdoches, Garrison, Timpson and Teneha."

"I, G. R. Cottingham, state upon oath that I am the auditor of the Galveston, Harrisburg & San Antonio Railway Company and of the Texas & New Orleans Railroad Company. That as such I am the custodian of the books and accounts of the said Galveston, Harrisburg & San Antonio Railway Company, of the New York, Texas & Mexican Railway Company, of the Gulf, Western
116 Texas & Pacific Railway Company, of the Galveston, Houston & Northern Railway Company and of the Texas & New Orleans Railway Company. That I am personally cognizant therefrom of the amounts of the gross receipts of said companies, as set forth in the answers of said companies, respectively, and in their special reports made to the Comptroller of the State of Texas, copies whereof are attached to defendants' answers respectively. That the amounts of said gross receipts of said companies, respectively, for the year beginning June 30, 1904, and ending June 30, 1905, as therein stated, are correct. That the words 'receipts from interstate traffic,' as therein stated, include also receipts from international and foreign traffic, as well as traffic between the States. That under the head 'Unapportioned' in each of said reports, as well as in said answers, are included receipts from the items mail, express, extra baggage, switching car service and locomotive mileage. That the books of each of said defendant companies are so kept that there is no apportionment of the State and interstate and international

traffic, except as to freight and passenger earnings respectively. That the said items included under the term 'unapportioned,' as above stated, are not divided between the State and interstate receipts, and are not so entered upon the books. That said items are incapable of a correct apportionment. That under the item mail, is included compensation for transportation of the United States mail, both between points wholly within the State of Texas, and to and from points without the State of Texas, and it is impossible to apportion such receipts. That the item express includes moneys paid to each of said companies by express companies for the
117 transportation of express matter. That the item express can not be by said railroad companies divided between the State and interstate traffic, for the reason that the original transportation is made by the express company and the railroad companies have no knowledge of the individual shipments. That the item extra baggage is susceptible of apportionment, but it has not been heretofore apportioned by these companies. That the items switching car service and locomotive mileage are incapable of exact apportionment, and any division thereof into State and interstate receipts must necessarily be a purely arbitrary division. That the passenger receipts for the quarter ending September 30, 1905, from points wholly within the State of Texas, are, as alleged in the answers, respectively, of said companies, and that the amounts therein alleged to have been paid as a tax on passenger receipts for the year ending June 30, 1905, and for franchise taxes, are correctly alleged in the answers of each of said companies, respectively."

"*Statement Showing Number of Counties and Incorporated Cities and Towns Through which the Sunset Lines in Texas Pass.*

Texas & New Orleans Railroad.

City.	County.
Athens	Angelina.
Beaumont	Anderson.
Dallas	Cherokee.
Houston	Dallas.
Jacksonville	Henderson.
Kaufman	Harris.
Liberty	Hardin.

118 Texas & New Orleans Railroad—Continued.

Nacogdoches	Jasper.
Orange	Jefferson.
Sabine Pass	Kaufman.
	Liberty.
	Nacogdoches.
	Orange.
	Rusk.
	Tyler.

The Galveston, Harrisburg & San Antonio Railway.

City.	County.
Columbus	Bexar.
El Paso	Brewster.
Eagle Lake	Colorado.
Flatonio	Caldwell.
Gonzales	El Paso.
Houston	Fayette.
Luling	Fort Bend.
La Grange	Gonzales.
Rosenberg	Guadalupe.
Seguin	Harris.
Schulenburg	Jeff Davis.
San Antonio	Kinney.
Del Rio	Medina.
	Maverick.
	Val Verde.
	Presidio.
	Pecos.
	Wharton.
	Uvalde.

119 New York, Texas & Mexican Railway.

City.	County.
Bay City	Fort Bend.
Rosenberg	Jackson.
Wharton	Matagorda.
	Victoria.
	Wharton.

Gulf, Western Texas & Pacific Railway.

City.	County.
Cuero	Bee.
Goliad	Calhoun.
Victoria	De Witt.
	Goliad.
	Victoria.

Galveston, Houston & Northern Railway.

City.	County.
Galveston	Galveston.
La Porte	Harris.

San Antonio & Gulf Railroad.

City.	County.
San Antonio	Bexar.
	Guadalupe.
	Wilson.

I, L. J. Cox, Tax Commissioner, do hereby certify that the above statement is correct to the best of my knowledge and belief."

"I, John E. O'Neill, state upon oath that I am the auditor of the Galveston, Houston & Henderson Railroad Company. That as such, I am the custodian of the books and accounts of the said Galveston, Houston & Henderson Railroad Company. That I am personally cognizant therefrom of the amounts of the gross receipts of said company, as set forth in the answer of said company, and in its special report made to the Comptroller of the State of Texas, copy whereof is attached to defendant's answer. That the amount of said gross receipts of said company, for the year beginning June 30, 1904, and ending June 30, 1905, as therein stated, is correct. That the words 'receipts from interstate traffic,' as therein stated, include also receipts from international and foreign traffic, as well as traffic between the States. That under the head 'Unapportioned' in said report, as well as in said answer, are included receipts from the items mail, express, extra baggage, switching car service and locomotive mileage. That the books of said defendant company are so kept that there is no apportionment of the State and interstate and international traffic, except as to freight and passenger earnings respectively. That the said items included under the head 'Unapportioned,' as above stated, are not divided between the State and interstate receipts, and are not so entered upon the books. That said items are incapable of a correct apportionment. That under the item mail, is included compensation for transportation of the United States mail, both between points wholly within the State of Texas, and to and from points without the State of Texas, and it is impossible to apportion such receipts. That the item express, includes moneys paid to said company by express companies for the transportation of express matter. That the item express can not be by said railroad company divided between the State and interstate traffic, for the reason that the original transportation is made by the express company, and the railroad company has no knowledge of the individual shipments. That the item extra baggage is susceptible of apportionment, but it has not been heretofore apportioned by this company. That the items switching car service and locomotive mileage are incapable of exact apportionment, and any division thereof into State and interstate receipts must necessarily be a purely arbitrary division. That the passenger receipts for the quarter ending September 30, 1905, from points wholly within the State of Texas, are as alleged in the answer of said company, and that the amount therein alleged to have been paid as a tax on passenger receipts for the year ending June 30, 1905, and for franchise tax, is correctly alleged in the answer of said company.

120

121

That as stated in said answer, the statement of the gross earnings of the Galveston, Houston & Henderson Railroad Company, for the year ending June 30, 1905, as made to the Comptroller of the State of Texas, includes the sum of $125,799.99, which was received from the Missouri, Kansas & Texas Railway Company of Texas and from the International & Great Northern Railroad Company for rent of

its tracks between the cities of Galveston and Houston, and for the use of its terminal facilities in the city of Galveston, as per contract, copy whereof is attached to this affidavit, and from the Gulf, Colorado & Sante Fe Railway Company for the use of its terminals, in the following amounts, towit:

From the International & Great Northern Railroad Co.	$62,000.00
From the Missouri, Kansas & Texas of Texas.....	61,999.99
From the Gulf, Colorado & Santa Fe Railway Company	1,800.00"

122 "I, C. K. Dunlap, state upon oath, that I am the General Freight Agent of the Galveston, Harrisburg & San Antonio Railway Company, and am by reason of my duties as such, personally cognizant of the matters hereinafter stated. That the Houston Direct Navigation Company is a corporation engaged in the transportation of freight by water from Houston to Galveston and intermediate points, said transportation being conducted by means of barges towed by steam tugs, and the articles transported consist largely of cotton, cotton seed meal and cake, rice, sand, slate, linseed oil, burlap bagging, gas pipe, coal, canned goods and shell. That said transportation is in direct and immediate competition with the railway lines of Texas operating between Houston and Galveston and into Galveston. That during the year ending June 30, 1905, said company transported 104,830 tons of 2000 pounds each, and that the earnings of said company, for the year ending June 30, 1905, were, I am informed, and believe the statement to be approximately correct, $130,159.91. That in addition to said Houston Direct Navigation Company, there are other companies and individuals engaged in the transportation of freight by water, between Houston & Galveston and intermediate points, that do an extensive business, the amount of which I am unable to state with accuracy, but between 4000 and 5000 tons of rice have been landed by said companies at Houston and Clinton during the present rice season, and that said transportation business by water, as above stated, is upon the increase. That said transportation by water from Houston to Galveston, Texas, determines the rates for transportation by railway lines between the same points. That a large transportation busi-
123 ness in oil, lumber and rice is done by persons and corporations owning steamships, barges and schooners between Port Arthur & New Orleans. That a business more or less extensive is done by water, conducted as above stated, between Lake Charles, Louisiana, Port Arthur, Sabine Pass, Orange, Beaumont and Galveston. That said business also extends to Velasco at the mouth of the Brazos, Palacios on Matagorda Bay to Corpus Christi and to Brownsville and between Galveston and these latter points. That there is a regular steamship service between Galveston and Brownsville. That this transportation, as above stated, is competitive with railway transportation, and has direct and immediate effect upon railway rates."

A. A. VAN ALSYTYNE, on behalf of the defendant, testified as follows:

The three companies, the G. H. & H., the I. & G. N. and the M. K. & T., transport freight and passengers between Houston and Galveston; the G. H. & H. runs its trains for that purpose, the I. & G. N. runs its trains for that purpose, and the M. K. & T. runs its trains for that purpose, both freight and passenger. It is a fact that all of the freight business of the I. & G. N., M. K. & T. and G. H. & H., between Houston and Galveston, is competitive with Buffalo Bayou; that includes all of the cotton that each and all of the roads transport from the interior of Texas to Galveston, and includes all of the freight of every character that they transport from Houston to Galveston, as well as all the freight they transport from Galveston to Houston, and that constitutes a very large volume of their traffic. That would also apply to the lines over which
124 this traffic passes, whether they reach Galveston or not, this particular tonnage I was talking about, the Cotton Belt, for instance, which doesn't reach Galveston. The Galveston and Houston rate is based on water competition. It affects rates all over the State, regardless of the lines on which the traffic originates or to which it is destined. I can not state the proportion of business done by the Houston Direct Navigation Company between Houston and Galveston, to the whole business done there by all the railroads who go to Galveston. I haven't kept any record of it at all; it would be a public matter, shown by the daily cotton receipts, as to the cotton part of it. Regardless of the amount of freight actually carried by the vessels on Buffalo Bayou and on Galveston Bay, between Houston and Galveston, it is a fact that the rates established by the vessels navigating these waters influence and affect all of the railroads' rates in the manner I have indicated, affecting as well the lines handling freight destined to Galveston, or originating at Galveston.

It is admitted that the allegations in defendant's answer, in relation to the filing and prosecution of the injunction suit by defendants *vs.* Jno. W. Stephens *et al.*, are correct.

It is agreed that the State Treasurer, under the advice of the Attorney General, if any amount less than the full amount of taxes sued for had been tendered in payment of the taxes for the year 1905, would not have accepted the same.

Defendant offers in evidence receipt of the State Treasurer for $182.87, issued to the Denison, Bonham & New Orleans Railroad Company, as follows:

125 "No. 1006. $182.87.

Treasury Department, State of Texas.

Tax	$166.25
10% penalty	16.62
	$182.87

AUSTIN, TEXAS, *December* 1, 1905.

Received of C. Bradford, of Bonham, Texas, Treasurer, for Denison, Bonham & New Orleans Railroad Company, the sum of one hundred and eighty-two and 87/100 dollars, State Tax for year ending June 30, 1905 (and 10% penalty included), at rate of — per cent,, as per certificate of Comptroller of Public Accounts, dated December 1, 1905, in accordance with Chapter 141, Acts of Twenty-ninth Legislature. Stipulation on reverse side a part of this receipt.

R. B. ROBBINS,
Chief Clerk, State Treasurer.

It is distinctly stipulated, agreed and understood that acceptance of said money shall not prejudice or affect the right of the State of Texas to sue for and recover of said company statutory forfeitures in the premises."

In the same connection, defendant offers in evidence the two receipts issued by the State Treasurer to the Weatherford, Mineral Wells & Northwestern Railroad Company and the Denison & Pacific Railway Company, on September 30, 1905, in substantially the same form as the receipt to the Denison, Bonham & New Orleans Railroad Company, and set out next above.

Defendant offers in evidence letter from the State Treasurer, addressed to D. C. Bolinger, of date November 6, 1905, as follows:

126 TREASURY DEPARTMENT, STATE OF TEXAS,
AUSTIN, TEXAS, *November* 6, 1905.

Mr. D. C. Bolinger, Agent and General Attorney, Texas Central Railroad Company.

DEAR SIR: I have to acknowledge receipt of your favor of the 6th. instant, and tender in actual cash of the sum of $4202, as payment in full of all taxes due by your company to the State of Texas, for the year ending June 30, 1905, under and by virtue of the General Laws of the State of Texas, known as the "Gross Receipts Tax Bill" or "Love Tax Bill," passed by the Twenty-ninth Legislature. I decline to receive the amount tendered, as the Comptroller of Public Accounts, on whose certificate only the Treasurer can issue a receipt, claims that the amount of tax due by your road, as shown by the report, amounts to $8299.03, together with a penalty of 10 per cent., $829.90, and a further penalty of two hundred dollars per day for five days, say one thousand dollars, making the total amount due $10,128.93.

Yours very truly, R. C. ROBERDEAU,
Chief Clerk, Acting Treasurer."

Defendant offers in evidence letter from the State Treasurer to F. H. Booth, of date October 30, 1905, as follows:

"TREASURY DEPARTMENT, STATE OF TEXAS,
AUSTIN, TEXAS, *October* 30, 1905.

F. H. Booth, Esq., *Agent St. Louis, Brownsville & Mexico Railway Company.*

127 DEAR SIR: I have to acknowledge receipt of yours of 30th. instant, with tender in cash of $1065.70, as amount in full of taxes and penalties due by the St. Louis, Brownsville & Mexico Railway Company, as per your statement, for that portion of the year 1905, from July 17th. to December 31st, five and one-half months, under and by virtue of the provisions of Chapter 141, page 336, Acts of Twenty-ninth Legislature.

The Comptroller's certificate of the amount of taxes due by said company for the entire year ending June 30, 1905, is for $2113.89, with penalty of 10 per cent., making total amount of taxes and penalty $2325.27, due by said company. Therefore, I decline to receive the amount tendered by you as payment in full.

Very truly yours, JNO. W. ROBBINS, *Treasurer.*"

It was shown that this case was postponed from the 28th. day of November, 1905, the day upon which it had been set for trial by agreement of the parties, with the approval of the court, to the day of trial, over the objections of defendant herein, upon the court's own motion, to await the decision of the Supreme Court of Texas upon certain applications for writs of mandamus, which applications had been filed by the county attorney of Travis county and the district attorney of the Twenty-sixth and Fifty-third Judicial Districts, respectively, and by them jointly, to ascertain whether they, jointly or severally, or the Attorney General of Texas, had the right to institute and prosecute this suit.

A. C. FONDA, a witness on behalf of the defendant, testified as follows:

128 My name is A. C. Fonda; I am Assistant General Freight Agent of the Gulf, Colorado & Santa Fe Railway Company. I have been engaged in the freight departments of railroads altogether about twenty-one years, and in Texas, about eleven years. In regard to the effect of competition of water carriage on Buffalo Bayou and Galveston Bay, between Houston and Galveston, as I understand the matter, the Buffalo Bayou is, in the first place, responsible for the differential adjustment of rates which exists between Houston and Galveston. The rates, local, between Houston and Galveston, are very much below the normal basis of all rail rates, on account of the competition of the Direct Navigation Company and other water craft on Buffalo Bayou. I have prepared a statement showing how much those rates between Houston and Galveston are below the rail rates not subject to water competition, in other parts of the State. I will give both the normal rail rates and the water competition rates for each class. On first class rail rate, 27; water competition, 20; second class rail rate, 25; water competition, 18; third class rail rate, 23; water competition, 16; fourth class rail

rate, 21; water competition, 15; fifth class rail rate 18; water competition 12; class A, all rail, 19; water competition 12; class B, rail rate, 16; water competition, 11; class C, rail rate, 13; water competition, 9; class D, rail rate 11; water competition, 8; class E, rail rate 8; water competition, 5. The water rates are approximately 71 per cent. of the standard rail rates for the same distance. By standard rail rates or normal rail rates, I mean where there is no water competition. The short line between Houston and Galveston is 48.4 miles, or a distance of 49 miles. The rates I have
129 mentioned are class rates, but there is a very long list of commodity rates applying between Houston and Galveston; it makes about two and a half pages of type written list, and I don't suppose it would be worth while to enumerate everything, but, for a few examples, here is bacon, in lots of five thousand pounds or over, 7½ cents is the water rate, and 25 cents would be the normal rail rate. By water rates, I mean the rates that are fixed between Galveston and Houston by water competition. These commodity rates were originally published in the tariffs of the Direct Navigation Company, and that tariff has been adopted by the through rail lines between Houston and Galveston as a matter of competition; the water competition practically fixes the rates between those two points. On cotton bagging and cotton ties the water rate is 5 cents; the normal rail rate 18 cents; the rate on canned goods is the same, 5 water rate, and 18 normal rail rate; car wheels in carloads, water rate, 5 cents; normal rail rate, 17 cents; coffee, in less than carloads, 7½ cents water rate, and 23 rail rate. Generally speaking, the statement which I have prepared is correct; it is compiled from the Commission's tariffs and that special commodity tariff, which is older than the Commission. Now, as a summary of this entire commodity list, the average or percentage of the entire list, the water rates are 42 7/10 per cent. of the normal rail rates; or, in other words, there is a reduction of 57 3/10 per cent. from the normal rail rates by reason of water competition.

Defendant offers in evidence list of rates prepared by Mr. Fonda, and testified to, as above, as follows

130 *"Commodity Rates Between Houston and Galveston.*

Figures Are Cents per 100 Pounds unless Otherwise Shown.

	Water rates.	Normal rail rates.
Axlegrease, carload	$0 06	$0 18
Bacon, lots 5000 pounds and over	07.5	25
Bagging and cotton bale ties	05	18
Bones, carload	05	07
Common brick, carload	1 50 per M.	03
Candy, carload	10	23
Canned goods, carload	05	18
Car wheels, carload	05	17
Cement and plaster, carload	05	08
Coffee, carload	05	18
Coal, anthracite, carload (per ton)	85	71.5
Coke, carload (per ton)	1 00	65

	Water rates.	Normal rail rates.
Coal, lots of 2000 pounds or more	07.5	21
Coal, lots of 2000 pounds or more	07.5	23
Coffee, less than carload	07.5	23
Cotton, in sacks, any quantity	15	27
Cotton seed, carload	05	08
Cotton seed, less than carload	12.6	23
Cotton seed ashes, lots of 2000 pounds or more	07.5	21
Cotton seed hulls, lots of 2000 pounds or more	07.5	21
Cotton seed meal, lots of 2000 pounds or more	07.5	21
Crackers, lots of 10 boxes or more	10	23
Fertilizer, lots of 2000 pounds or more	07.5	16
Frames, door and window	05.	10
Hair, camels', carload	07.5	18
Household goods, carload (per car)	10 00	22 00
Ice, carload	03¼	05
Ice, less than carload	15	27
131 Iron, merchant, carload	05	18
Iron, pig, carload	05	18
Iron or steel rails and fastenings, carload	1 00	17
Junk, carload	05	07
Lime, strt., carload	05	07.5
Lumber, lath and shingles, carload	05	10
Mineral water, lots of 5000 pounds or more	12.5	23
Mineral water, carload	12.5	18
Oil, coal, carload	06	05.5
Rice hulls, carload	04	05
Rock and granite, crushed in blocks, per ton	35	45
Roofing slate, carload	05	08
Salt, carload	05	08
Salt, in lots of 2000 pounds or more	07.5	21
Sapolio, crystals, washing and scouring powders, lots of 20 boxes or more	10	21
Scrap iron, carload	05	07
Soap, carload	07.5	18
Soap, in lots of 20 boxes or more	10	21
Soap stock, lots of not less than 3000 pounds	20 bbl.	23
Soap stock, carload (per barrel)	20	08
Sugar and molasses, carload	05	20
Rice, carload	05	05
Sugar and molasses, less than carload	07.5	23
Rice, 2000 pounds or over	07.5	21
Tallow, lots of 2000 pounds or over	08	21
Wire, nails or staples, carload	06	18
	336	786

42.7 per cent.

132 Galveston–Texas City, 15.1 Miles.

5 Classes, %	1	2	3	4	5	A	B	C	D	E
Rail	24	21	18	15	12	13	11	—	—	—
Water... 88	20	18	16	12	12	11	9	8	5	...

Galveston–Velasco, 84.5 Miles.

Rail	47	43	40	36	28	29	26	22	17	14
Water... 62	25	25	25	25	20	20	20	16	15	12

Houston–Galveston, 48.4 Miles.

Rail	27	25	23	21	18	19	16	13	11	8
Water... 71	20	18	16	15	12	12	11	9	8	5

Houston–Texas City, 42.3 Miles.

Rail	33	30	27	24	21	22	19	15	12	10
Water... 60	20	18	16	15	12	12	11	9	8	5

Houston–Velasco, 60.2 Miles.

Rail	39	35	32	29	24	25	22	18	15	12
Water... 75	25	25	25	25	20	20	20	16	15	12

Orange–Sabine, 51.9 Miles.

Rail	28	26	24	22	18	19	16	13	11	9
Water... 70	20	18	16	15	12	12	11	9	8	5

Velasco–Texas City, 86.1 Miles.

Rail	46	41	37	32	27	28	25	20	17	14
Water... 66	25	25	25	25	20	20	20	16	15	12

Galveston–Beaumont (G & I Mileage) 75.3 Miles.

Rail	36	33	31	29	22	23	20	17	14	11
Water... 75	30	28	20	20	15	15	15	15	14	11

Houston–Beaumont, 83.6 Miles.

Rail	38	35	33	30	23	24	21	18	14	11
Water... 71	30	28	20	20	15	15	15	15	14	11

133 Galveston–Hawkinsville, 108.1 Miles, and Galveston Differential.

5 Classes, %	1	2	3	4	5	A	B	C	D	E
Rail	54	50	45	41	31	32	29	25	19	16
Water... 63	30	30	30	30	20	20	20	20	20	16

Houston–Hawkinsville, 108.1 Miles.

Rail	47	44	40	38	28	29	26	23	17	14
Water... 71	30	30	30	30	20	20	20	20	20	16

Galveston–Liberty, 41½ Miles, and Galveston Differential.

Rail		31	28	25	21	19	20	17	13	11	9
Water...	80	[illegible]									

Houston–Liberty, 41½ Miles.

Rail		24	22	20	18	16	17	14	11	9	7
Water...	99	24	22	20	18	15	15	14	11	9	7

Galveston–Orange, 105.6 Miles, and Galveston Differential.

Rail		53	49	45	40	30	31	28	24	19	16
Water...	52	30	28	20	20	15	15	15	15	15	14

Houston–Orange, 105.6 Miles.

Rail		46	43	40	37	27	28	25	22	17	14
Water...	59	30	20	20	20	15	15	15	15	15	14

Galveston–Port Arthur, 103.2 Miles, and Galveston Differential.

Rail		60	55	50	44	34	35	32	27	21	18
Water...	57	35	33	25	20	20	20	20	20	16	13

Houston–Port Arthur, 103.2 Miles.

Rail		53	49	45	41	31	32	29	25	19	16
Water...	63	35	33	25	25	20	20	20	20	16	13

Galveston–Port Lavaca, 153.5 Miles, and Galveston Differential.

Rail		66	61	55	51	37	38	35	29	22	18
Water...	52	30	30	30	30	20	20	20	20	20	16

134 Houston–Port Lavaca, 153.5 Miles.

5 Classes, %		1	2	3	4	5	A	B	C	D	E
		—	—	—	—	—	—	—	—	—	—
Rail		59	55	50	48	34	35	32	27	20	16
Water...	57	30	30	30	30	20	20	20	20	20	16

Galveston–Ruliff, 109.5 Miles, and Galveston Differential.

Rail		54	50	45	41	31	32	29	25	19	16
Water...	62	35	33	25	25	20	20	20	20	20	14

Houston–Ruliff, 109.5 Miles.

Rail		47	44	40	38	28	29	26	23	17	14
Water...	70	35	33	25	25	20	20	20	20	20	14

Galveston–Sabine, 113.5 Miles, and Galveston Differential.

Rail		55	51	46	42	31	32	29	25	19	16
Water...	50	30	28	20	20	15	15	15	15	15	14

Houston–Sabine, 113.5 Miles.

Rail		48	45	41	39	28	29	26	23	17	14
Water...	56	30	28	20	20	15	15	15	15	15	13

Beaumont and Points Between Houston and Galveston.

Rail	45	41	38	33	26	27	24	20	16	13
Water 75	37	34	25	22	18	18	18	17	16	13

Between Local Points Between Houston and Galveston and Points South of Beaumont, Except Port Arthur and Sabine.

Rail	52	47	43	36	29	30	27	22	18	15
Water... 78	44	40	30	26	21	21	21	19	18	15

Average, 64.9 per cent.

Lumber Rates.

	Normal.	Water.
Orange to Matagorda and Corpus Christi	18¾	13¾
Beaumont to Matagorda and Corpus Christi	18¾	13¾

135 This statement also includes the water competition rates between quite a number of other points; I believe there are about twenty-five different sets of rates here, applying between different points which we have made a comparison on. The movement, other than between Galveston and Houston, is very largely in less than carloads. I have worked out the precentage on less than carload classes only; not on the entire list of classes, because it was less trouble to make that comparison. The rates between Galveston and Texas City, based on water competition, are 88 per cent. of the rail rates for the same distance. Between Galveston and Velasco, the rates are 62 per cent. of the normal rail rates. Between Houston and Texas City, the rates based on water competition are 60 per cent. of the normal rail rates. Between Houston and Velasco, 75 per cent. of the normal rail rates. Between Orange and Sabine Pass, the water rates are 70 per cent. of the normal rail rates. Between Velasco and Texas City, 66 per cent. of the rail rates. Between Houston and Beaumont, 71 per cent. of the normal rail rates. Between Galveston and Beaumont, 75 per cent. of the rail rates. Between Galveston and Hawkinsville, 63 per cent. of the normal rail rates. Between Houston and Hawkinsville, 71 per cent. of the normal rail rates. Between Galveston and Liberty, 80 per cent. of the normal rail rates. Between Houston and Liberty, 99 per cent. of the normal rail rates. That is the only instance where there is no substantial reduction by reason of water competition. Between Galveston and Orange, 52 per cent. of the normal rail rates. Between Houston and Orange, 59 per cent. of the normal rail rates. Between Galveston and Port Arthur, 57 per cent. of the normal
136 rail rates. Between Houston and Port Arthur, 63 per cent. of the normal rail rates. Between Galveston and Port Lavaca, 52 per cent. of the normal rail rates. Between Houston and Port Lavaca, 57 per cent. of the normal rail rates. Between Galveston and Ruliff, 62 per cent. of the normal rail rates. Between Houston and Ruliff, 70 per cent. of the normal rail rates. Between Galveston and Sabine, 50 per cent. of the normal rail rates. Between Houston and Sabine, 56 per cent. of the normal rail rates.

Between Beaumont and points between Houston and Galveston, 75 per cent. of the normal rail rates. Between local points between Houston and Galveston and towns south of Beaumont, other than Port Arthur and Sabine, 78 per cent. of the normal rail rates. The average of the entire list, twenty-five or twenty-six towns, is a reduction of 64—the water competition rates are 64 9/10 per cent. of the normal rail rates, being a reduction of 35 1/10 per cent. from such rates.

I have here a comparative statement of the cotton receipts in Galveston for the season from September 1, 1903, to August 31, 1904; also for the same period, September 1, 1904, to August 31, 1905. During the season of 1903-4, the barge lines delivered in Galveston 413,767 bales of cotton out of a total of 2,227,286 bales, the barge lines' percentage being 18 6/10 per cent. During the season of 1904-5, the barges delivered in Galveston 392,956 bales out of a total of 2,882,621 bales, being 13 6/10 per cent. of the total. The information as to other commodities handled by the barge lines was included in the aggregate in the deposition of Mr. Dunlap, which was submitted today. I have some detailed figures, but they are
137 a little differently separated. The southbound to Galveston consists of cotton, one hundred thousand and some odd tons, and bank dirt or sand, 2747 tons. Then the northbound from Galveston to Houston, they have handled roofing salt, 51 tons; linseed oil, 13 tons; burlap bags, 15 tons; gas pipe, 375 tons; coal, 613 tons, and cotton bagging, 180 tons; total, 1247 tons. That total corresponds with the total given by Mr. Dunlap. Water transportation undoubtedly existed between Houston and Galveston before we had any railroads in Texas, although that was prior to my knowledge of the situation. It is perfectly natural that when the railroads were built between Houston and Galveston they had to carry the freight at approximately the same rates as the water carriers, or they didn't get the business; that is something the railroads or nobody else can control. It is a difficult matter to tell exactly what the effect of water competition is. By reason of water competition, the differential adjustment exists between Houston and Galveston; that is, the rates between Houston and Galveston are named; on cotton, the rate is 6 cents, in effect between Galveston and Houston. If you didn't have that differential adjustment, nobody can say just what adjustment we would have, but a reasonable adjustment would be a mileage schedule, reaching probably the same maximum rate which we have at Galveston. For instance, if we have a 60 cent rate, as we did prior to June 1st, to Galveston, and 54 to Houston, the mileage scale should be extended so as to reach the 60 cent rate at some greater distance than where the 54 cent rate is reached. Under an adjustment of that kind, the rate to Galveston would be somewhat greater from a great many points than they are
138 now; they probably would not be less from any point; when the maximum rate was reached, why it would be the same rate of 60 cents. Until the maximum rate was reached the Bayou competition would be the through rate; in other words, if the rail-

road rate was 40 cents to Houston, and the Bayou rate was 6 cents, the shipper of cotton would not pay any more than 46 cents to get his cotton to Galveston; and what applies to cotton applies to everything else going and coming; the differential adjustment is applied to all the rates. The fact is that differential or Bayou competition there affects interstate rates much more extensively, to my mind, than it does intrastate. Without being mathematically accurate, the differentials of Galveston over Houston approximate what the barge line would be willing to handle the traffic for. Under the present adjustment, the water carriers don't undertake to compete for merchandise to any great extent; they handle the heavier and greater commodities like cotton, for example. If the rail lines should materially increase their merchandise rates, that would open the way for the water carriers to put in much better service and compete more actively than they are. The presence of the water there, the actual existence of competition to a large extent, and the knowledge that it pre-exists to a greater extent, keeps the rail rates down between Houston and Galveston on a much lower basis than between other points in Texas, where no water competition exists. And by reason of the fact that the Railroad Commission or Bayou, or whatever may have been the cause, has fixed the rate to and from Galveston at so much higher than the Houston rate, this lower rate between Houston and Galveston affects the rates to all
139 parts of Texas; I mean the local or intrastate rates. The Bayou affects the rates to Houston from every direction; in other words, if Houston had no Bayou, they would get the same rates from interstate points that Temple, for example, gets, or Waco, or Fort Worth or Dallas. There would be no reason why they would be or should be on any other basis than the Texas common-point basis. Taking a shipment moving from St. Louis to Dallas, and another shipment of the same commodity moving to Houston, generally speaking, Houston takes the lower rate; there is some instances where it doesn't apply; the rail line hauls stuff when moved by rail, some three hundred miles further to Houston, and charges less than they do to Dallas. Those rates are due to a combination of water competition rates; that is, to cut the matter short, the rail rate from St. Louis to Houston is approximately based on the water rate down the Mississippi River and the local rail rate from New Orleans to Houston. Really, Galveston is the basis of making those rates; that is, the rates to Galveston are made by water down the river to New Orleans, and from New Orleans to Galveston; and, by reason of the Bayou, Houston comes in on the same basis, and, in a great many cases, I might say quite generally, the Houston rate is made higher than the Galveston rate by the ordinary Galveston differential; it is very much lower than the interior Texas points, however; so that this water competition between Houston and Galveston not only affects State rates, but generally the interstate rates on everything that moves to Houston or is reshipped from Houston. Through Houston and Galveston, or direct shipment from Galveston to some interior point that is not affected by it, excepting in the way

that has already been brought out on intrastate rates, as
140 being a differential over the Houston rate, it does affect in that way, although it is not quite as universal as it is on the interstate rate. We have not mentioned the rates from seaboard; that is, what is termed "seaboard territory"; the territory east of a line drawn north and south through Buffalo, Pittsburg and so forth, including all of New England, the States of New York, Pennsylvania, Maryland, and so forth; all of that business which usually moves via New York and the steamship lines to Galveston, the rates are made the Galveston rate plus the Houston differential, or the Galveston differential, if you will; that is to say, the Houston common rates range from 3 to 7 cents higher than the Galveston rate, by reason of the Buffalo Bayou competition. I could not give an approximation of the proportion of the Texas State and interstate that is handled through Houston and Galveston on cotton; I might make a guess, but it would not be at all accurate, because not based on any exact knowledge of it. Cotton is one of the largest items. As to cotton, I know in a general way that about 80 or 85 per cent. of the Texas cotton goes to Galveston, but what percentage it is to the total traffic of the State I have nothing on which to give an accurate approximation. Cotton is one of the largest and most profitable items. It is a fact that there is a very large amount of merchandise handled through Galveston to the interior of Texas. There are five steamers a week coming to Galveston from New York; that is the ordinary schedule, and occasionally there is an extra one. The southbound merchandise going through Galveston by those steamers nearly or quite equals the tonnage of cotton that goes north-
141 bound by the same steamers. The products of cotton, cotton-seed and oil, and stuff of that kind, is a very large item in the tonnage shipped through Galveston; it considerably exceeds cotton on account of the weight. In the way of competition by electricity, on the part of the G., C. & S. F., there is an interurban electric line between Temple and Belton, which has been constructed about a year, may be a little over a year. I am not informed at the present time whether it carries anything besides passengers; it does carry passengers, but I don't know whether it carries any express or not. There is also an electric line between Sherman and Denison.

I know as a general matter of history the congressional action, and that water competition was in prospect between Galveston and Dallas by the Trinity River. I am not informed about the project between Waco and Galveston, and I hadn't heard that demand had already been made on the G., C. & S. F. to put a draw in its bridge where it crosses the Brazos in Fort Bend County; that is an operating department proposition. The distance from Denison to Sherman by the Frisco is 9 2/10 miles; I suppose it must be about the same by the electric line. The distance from Temple to Belton is 8 1/10 miles by the Santa Fe. My recollection is the distance from Dallas to Fort Worth on the electric line is 32 miles. I don't know of any other electric lines in actual operation. I don't know of any steamboats operating up and down the Brazos River between Galveston and Richmond, but I think there are some water craft

that operate and come into Galveston, known as the "Mosquito Fleet." I am not sure of what extent they come from the Brazos River, but I think some of them do; they come from all along the coast there, and there is quite a large number of them.

142 The "Mosquito Fleet" is composed of little sail boats that come in with all kinds of agricultural products to Galveston, a great deal of vegetables and farm products, and oysters, I suppose. The water traffic is transported from Houston to Galveston down the Bayou there on barges. I don't know of any companies engaged in that business at the present time, that amount to anything, except the Direct Navigation Company. There are several lines which are operating, but they don't do any business between Houston and Galveston; that is, between those two cities; they work the intermediate territory. I don't believe I could undertake to say who owns the Direct Navigation Company. I know that Mr. C. K. Dunlap is the general freight agent of it; it would indicate some connection with the Southern Pacific. Mr. Dunlap is general freight agent of the G., H. & S. A., which is a part of the Southern Pacific; also of the Houston & Texas Central, and of the Direct Navigation Company. As a freight man, coming in contact with Mr. Dunlap, we count him as general freight agent of the Southern Pacific lines. The Houston Direct Navigation Company has their own separate office at Galveston; at least, they have a separate agent there; I don't recall his name now. I know they have an office in Houston, but I don't know where the building is; I think their agent at Houston is Mr. Bushong. I have heard of the vessel that made two or three trips from Shreveport to Denison last year; that is, in the newspapers, and I know as an actual fact of the navigation of the Trinity River from Trinity down to the Gulf; at one time, I made considerable inquiry into that. There is considerable business done on the Neches and Sabine Rivers between Port Arthur and Sabine Pass and Galveston and Houston and other points. I don't

143 know exactly where all the vessels run that are in operation there, but I have some information about it in a general way. During the year 1904, on the Neches River, there were in service twelve steamers with a total registered tonnage of four thousand tons, and they made two hundred and ninety trips; and there were nine barges with a registered tonnage of forty-two thousand tons, and six barges made trips to the number of two hundred and eighty-seven. The tonnage which they report as having been handled during the year 1904 was 161,516 tons. There is actual transportation of oil between Port Arthur and Galveston. At Galveston, there are tanks there near the water front, and pipe lines or some suitable connection to unload the oil from the steamers into those tanks. There is actual transportation of oil in barges between Houston and Galveston. Oil is piped from Humble to Houston loaded on barges there and brought into Galveston. Regardless of who owns the Direct Navigation Company, the presence of that water navigation keeps those rates down between Houston and Galveston, and if it was not owned by somebody that does own it, some one else would have something there to take its place, and it might make

it worse for the railroad companies than it does now, if the ownership was different. Cotton was transported down the Bayou from Houston to Galveston during the year ending August 31, 1904, to the extent of 413,787 bales; and, for the year ending August 31, 1905, 392,956 bales. I got that data from the Galveston Cotton Exchange, and they got daily reports from all the agents of the various lines in Galveston of their daily receipts, and those figures were compiled by the secretary of the Cotton Exchange, and made
144 a matter of record there. The way I understand it, all of the cotton hauled on barges from Houston to Galveston was done by the Houston Direct Navigation Company. It is possible that some other barge brought in a load, but I don't think so. The Texas & Pacific Railway is one of our strong competitors. They do more especially, an interstate business, but, to a greater or less extent, it also includes State business. When the Texas & Pacific carries cotton to New Orleans, destined to foreign countries, it has to meet whatever rate we make through Galveston, and the man that wants to ship cotton by New Orleans through to Liverpool, has to pay no more that way than through Galveston; the rates quoted at Liverpool are quoted daily on the rate through Galveston. Usually there is a very large movement of grain from Kansas and Nebraska to Galveston, over the Texas railroads, for export; that usually exists every year. As to the lines running from Kansas and Nebraska to the Gulf, that handle that business, there is competition against lines running to other ports, such as lines running to New Orleans, Newport News, Baltimore, New York, and so forth; and of course, there is also competition between themselves. There is probably also competition with the St. Lawrence River at certain times, during the time of lake navigation; and more so as to the Erie Canal than the St. Lawrence River for those running through the Great Lakes and the Erie Canal through Buffalo to New York. It is customary, in considering traffic which bears a comparatively low revenue, to take into consideration all expenses that are involved in handling it, current expenses of all kinds; that is, such as switching, elevator charges, and so forth on grain, and expenses
145 of that character, and a tax of 1 per cent. on the gross receipts of the railroad would be just as proper to consider, and would be considered just the same as such terminal expenses, and just as much so as elevator charges or switching charges that might be incurred in securing or handling the shipment. The less the cost of handling traffic, the lower you can afford to make the rates. If the State of Texas, should require us, instead of paying 1 per cent. of our earnings, to pay 20 per cent., we couldn't handle grain from the Missouri River; from Western Kansas, where the rates are considerably higher than the Missouri River, probably we would handle it; but the Missouri River is the greatest grain market, I believe, in the United States, and an immense quantity of grain is drawn there from the territory west and from other contiguous territory, for export via various ports, and Galveston gets a considerable share; a fair share of that movement. That has always had much lower rates than grain which moves direct from the stations where it is produced, and, grain moving on those so-called proportional rates from the

Missouri River, we would undoubtedly be cut out of by the considerable tax that was suggested; and the nearby territory, the territory nearer the Missouri River where the rates are correspondingly low, we might be cut out of that also. Fom the far western part of Kansas, where the rates are considerably higher, possibly it would not be affected to the same extent. There is a very large movement of lumber from the Texas lumber mills to the Indian Territory, Kansas, Illinois, Indiana and Michigan. The rate from the Texas lumber mills to Wichita, Kansas, is 27½ cents; to Chicago, 26 cents. The railroads get less for hauling the lumber from here to Chicago than they do to Wichita, Kansas. The rate varies to Indiana
146 points, being based on a combination of the rates to the Mississippi River and the local rates, but it will run from probably 26 to 30 cents, possibly some cases a little less than 30 cents. From mills on the G., C. & S. F. to Wichita, Kansas, the G., C. & S. F. receives approximately 20 cents per 100 pounds; in some cases it would be as high as 20 6/10, and it might run a fraction under 20 cents in some cases, depending on the points coming from. To Chicago, the G., C. & S. F.'s proportion would be approximately 10 4/10 per 100 pounds; we would get just about one-half for the same haul when it goes to Chicago as we would to Wichita. To Indiana points, I should say that the G., C. & S. F.'s proportion would be approximately from 8 to 9 6/10 cents per 100 pounds. The low rates to Chicago and Indiana points are necessary to meet the competition of other lumber producing territories; that is to say, yellow pine lumber moves from Louisiana and Mississippi, and I think from some parts of Alabama, probably, to that territory by lines like the Illinois Central or the Mobile & Ohio, which are lines running directly north, parallel with the Mississippi River. The Texas lumber shippers would be shut out of Chicago and Indiana markets, altogether, if we were to charge them any higher rates. In hauling lumber to Indiana for 8 cents, there is really no margin, or no substantial margin of profit in it to the G., C. & S. F.; it is very close indeed to the cost of the service. If it had to give up 1 per cent. of its earnings on that lumber, that might be entirely a loss to the railroad company, and, if it was several per cent., it would certainly be a loss, and we might have to abandon that traffic altogether. It is true, generally, that in reaching re-
147 mote markets with our products, or in bringing traffic from remote sources of supply, in meeting competition from other directions, rates are oftentimes reduced, and earnings correspondingly reduced. For instance, if we reached out and tried to bring grain from the Dakotas, it would all have to be moved on substantially the Missouri River proportional export rate, which I have before mentioned, or even lower than that; the chances are it would be even lower than that. The conditions I have referred to in regard to this traffic also apply in the same way to our competitors, such lines as the Missouri, Kansas & Texas, Houston & Texas Central, St. Louis Southwestern and other lines that handle stuff in the same direction. The railroads undoubtedly make a better profit than 1 per cent. on some traffic; some traffic is more profitable than

others. I am speaking of interstate traffic; I don't suppose that 1 per cent. is the limit of the profit on all interstate traffic.

The defendant offers in evidence the articles of incorporation of the Texas & Pacific Railway Company; said articles of incorporation consisting, first, of an Act of Congress, entitled "An Act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes;" said act passed and approved by the Congress of the United States on March 3rd, 1871, and is contained and is a part of the Sixteenth Statute- at Large, page 573. Among other provisions, said charter provides; That the Texas Pacific Railroad Company (Section 1) is "hereby created a body politic and corporate, in fact and in law, by the name, style and title of the Texas Pacific Railroad Company, and by that name shall have perpetual succession, and shall be able to sue and
148 be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and use a common seal; and the said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous line of railroad and telegraph, with appurtenances, from a point at or near Marshall, county of Harrison, in the State of Texas; thence by the most direct and eligible route to be determined by the company, near the thirty-second parallel of north latitude, to a point at or near El Paso; thence by the most direct and eligible route to be selected by the company through New Mexico and Arizona to a point on the Rio Colorado at or near the southeastern boundary of the State of California; thence by the most direct and eligible route to San Diego, California; pursuing in the location thereof, as near as may be, the thirty-second parallel of north latitude, and is hereby invested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act."

Section 2 provides for a Board of Directors of not less than seven, nor more than seventeen.

Section 3 provides that the capital stock shall not exceed fifty million dollars.

Section 4 authorizes it to purchase or consolidate with any railroad company or companies heretofore chartered by congressional, State or territorial authority on the route prescribed in the first section of the act; but no such consolidation shall be with any competing line of railroads to the Pacific.

Section 8 grants the right of way to the company through the public lands of the United States.

Section 9 makes to it a land grant of forty sections per mile
149 in the Territories and twenty sections per mile in the State of California.

Section 11 authorizes it to issue construction and land-grant bonds; and its powers in this regard were enlarged by the supplemental Act of May 2, 1872 (17 Statutes, 59), which changed its name to "The Texas & Pacific Railway Company" (its present name), and enacted that that company shall possess and enjoy all the rights,

privileges and franchises heretofore conferred upon the Texas Pacific Railroad Company.

Section 2 of said amendatory act gave authority to issue construction and land-grant bonds authorized by the eleventh section of the original act, not exceeding forty thousand dollars per mile of said road, and as said company may deem needful to provide for the construction and equipment of its line, and to include in the mortgage or mortgages to secure said land-grant bonds, any portion of said lands not so used to secure the construction bonds. To provide that the land-grant bonds shall not exceed two and one-half dollars per acre for all lands covered by the mortgage or mortgages securing the same. Said supplemental act provided that the aforesaid bonds and authorized capital stock, or the proceeds thereof, should be applied only for the purpose of securing the construction, operation and equipment of the contemplated railroad line under lawful contracts with such parties and on such terms and conditions as the company may deem needful, etc. (Section 3).

Section 5 directed when the construction should be commenced and how far it should be prosecuted, and required the completion of the road by May 2, 1882. It also contained this provision:
150 "Upon failure so to complete it, Congress may take such measures as it may deem proper to secure its speedy completion."

Section 13 of the original act required annual reports to be filed with the Secretary of the Interior, exhibiting the financial situation of the company, amount of money received and expended, and the number of miles of road constructed in each year.

The nineteenth section of the original act is as follows: "That the Texas Pacific Railroad Company shall be, and it is hereby declared to be, a military and post road; and, for the purpose of insuring the carrying of the mails, troops, munitions of war, supplies and stores of the United States, no act of the company nor any law of any state or Territory shall impede, delay or prevent the said company from performing its obligations to the United States in that regard; provided, that said road shall be subject to the use of the United States for postal, military and all other governmental services at fair and reasonable rates of compensation, not to exceed the price paid by private parties for the same kind of service, and the government shall at all times have the preference in the use of the same for the purpose aforesaid."

Defendant offers in evidence Act of Congress of date March 3, 1871, by which the name of the Texas Pacific Railroad Company was changed to The Texas & Pacific Railway Company.

Defendant offers in evidence Act of Congress of date June 22, 1874, this being an act entitled "An Act supplementary to the act entitled 'An Act to incorporate The Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes.'"

Among other provisions contained in this supplementary
151 act, it provided as follows: "That the aggregate of the said bonds to be issued under and secured by said mortgage or mortgages shall not exceed the limit heretofore fixed by Congress,

and said mortgages for the division east of Fort Worth shall embrace the roads and property of the Southern Pacific Railroad Company and of the Southern Trans-continental Railway Company, heretofore merged in and consolidated with the said Texas & Pacific Railway Company, under the authority and requirements of the laws of the State of Texas; and which roads so merged as aforesaid shall, for that and all other purposes, be deemed and taken to be a part of the said Texas & Pacific Railway, and shall hereafter be subject to all the provisions and limitations of the Act of Congress incorporating said company, and of the supplements thereto."

Defendant offers in evidence Special Act of the Legislature of the State of Texas, passed May 24, 1871, entitled "An Act to encourage the speedy construction of a railway through the State of Texas to the Pacific Ocean," as follows:

"Whereas, The State of Texas has heretofore, at different periods, incorporated three different companies with power to construct a railway from the eastern boundary of the State to El Paso, on the Rio Grande, to-wit: The Southern Pacific Railroad Company, the Memphis, El Paso & Pacific Railroad Company, and the Southern Transcontinental Railway Company; and,

Whereas, The object of the State in these several acts of incorporation has ever been to secure the construction through the State of a railway connecting the railway system of the Atlantic States with the Pacific Ocean; and,

Whereas, There is reason to believe that the said, The
152 Southern Transcontinental Railway Company will succeed, by contract, to the rights, franchises and property of the said, The Memphis, El Paso & Pacific Railroad Company; and that the time has come when, by concert of action between all of the said companies, and by the aid of the Government of the United States, the great object of the railway to the Pacific Ocean through the State of Texas may be attained; and,

Whereas, The speedy construction of said railway through the State of Texas would greatly enhance the value of the public lands, develop the mineral resources of the State, and give protection and security to the frontier by expelling therefrom the bands of hostile Indians, by whom the western settlements are now continually scourged; and,

Whereas, These objects warrant and demand the most liberal legislation on the part of the State; therefore,

SECTION 1. Be it enacted by the Legislature of the State of Texas, that in order to secure the prompt and speedy construction of a railway through the State of Texas to the Pacific Ocean, and thereby secure the incidental advantages of cheap transportation for immigrants to the western and unsettled portions of the State, facility of communication between the eastern and western boundaries, the settlement and enhancement in value of the now unoccupied public domain, and the development of the great mineral, agricultural and stock raising resources of the State of Texas hereby consents, binds and obligates itself to donate, and does hereby grant to the Southern Pacific Railroad Company and to the Southern Transcontinental

Railway Company, heretofore chartered by the Legislature of the State of Texas, the bonds of the State of Texas to the amount
153 of six millions of dollars, in the manner and upon the terms and conditions following, to wit: To The Southern Pacific Railroad Company there are hereby granted the bonds of the State to the amount of three millions of dollars; and to the Southern Transcontinental Railway Company, there are hereby granted the bonds of the State to the amount of three millions of dollars upon the condition that the said companies, within six months after the passage of this act, will agree upon a point of junction of the two roads, which said point of junction shall be west of the longitude of the eastern boundary line of Shackelford County, and between the thirty-second and thirty-third parallels of north latitude, and shall file such agreement, duly executed by the two companies, in the form of an indenture between the two companies, in the office of the Secretary of State of the State of Texas. The said, The Southern Pacific Railroad Company shall build its road from the present western terminus thereof, at Longview, in Upshur County, by the most practicable route, to the city of Tyler, in Smith County, so that the said road shall pass within one-half mile of the courthouse in said city; and from the said city of Tyler, the said road shall be built westwardly, so as not to depart more than five miles from a due west course, until it shall cross the Brazos River; and the said road shall be built from said Brazos River by the most practicable route to the point of junction. And the said, The Southern Transcontinental Railway Company shall build its road from Jefferson to a point on the eastern boundary line of the State of Texas, bordering on the State of Arkansas, at or near Texarkana, and thence to a point of junction, confining its line, as nearly as may be prac-
154 ticable, to the old survey of the Memphis, El Paso & Pacific Railroad Company. The said companies within twelve months after the passage of this act, shall make a survey of the route of each of the said roads to the said point of junction, and shall file a map of the said routes in the General Land Office at Austin, and in the office of the Secretary of State, and the distances between the principal points along said routes to the said point of junction, shall be carefully noted on said map.

SECTION 2. The bonds in the foregoing section granted, shall be of the denomination of one thousand dollars each, payable to the company which may be entitled, under the provisions of this act, to receive them, or bearer, in thirty years from the date thereof, with interest at the rate of 8 per centum per annum, payable semi-annually, viz: On the first day of January and the first day of July of each year; said bonds to have coupons attached for each installment of interest to become due, which said coupons shall be made payable upon presentation at the city of New York, through such agent or agents of the State as the Governor of the State may select and appoint to pay the same; the said bonds shall be signed by the Governor and the Treasurer of the State of Texas, shall have the seal of the State affixed to them, and shall be countersigned and registered by the Comptroller of Public Accounts.

SECTION 3. Unless and until adequate means shall be otherwise provided by law, for the payment of the current interest and 2 per centum as a sinking fund for the redemption of the principal of the bonds that may be issued under the provisions of this act, the Comptroller of Public Accounts shall cause to be assessed a tax upon all taxable property, real and personal, in the State, and upon
155 all occupations, proportioned to the taxes levied by general law on such property and occupations, sufficient annually to pay the accruing semi-annual interest on the bonds that may be issued under the provisions of this act, and 2 per centum as a sinking fund, which said sum shall be assessed and collected, and deposited in the treasury of the State, subject to the order of the Governor, to meet the payment of the interest coupons and the principal of said bonds, as soon as and whenever the same shall become due; provided, that no greater tax shall be assessed and collected by authority of this section, than may be needed from time to time to pay said interest and sinking fund; and provided further, that whenever adequate means shall be otherwise provided by law for the payment of the said interest and sinking fund, this section shall have no further force or effect, nor shall any tax whatever be assessed or collected by authority of this section, until the bonds granted by the first section shall have been issued in accordance with the provisions of the various sections of this act.

SECTION 4. None of the bonds hereinbefore provided for shall be issued or delivered to either of the said railroad companies until both of the said roads shall be completed to the point of junction fixed in the first section of this act; and upon the completion of both of the said roads to the said points of junction, the whole amount of the bonds hereinbefore granted shall be delivered to the said companies, respectively, unless the Legislature of the State shall have substituted for said bonds a grant of the public lands as hereinafter provided; provided, that before issuing and delivering any of the said bonds to the said companies, or either of them, the Governor of the
156 State shall have such evidence as may be satisfactory to him, or such as may be prescribed by law, that both of the said roads have been completed to the said point of junction, and are then open to the use of the public.

SECTION 5. Whenever the Legislature of the State shall have power under the Constitution of the State to grant the public lands of the State in aid of internal improvements, it shall be competent for the Legislature (if it shall think proper to do so) to substitute for the bonds hereinbefore granted, a grant of the public lands to each of the said railroad companies to the amount of twenty-four sections to each of said companies for each mile of road built by the said companies, respectively, after the passage of this act, to the said point of junction.

SECTION 6. If the Legislature of the State shall not have substituted a grant of public lands for the said bonds, as is provided for in the foregoing section before the said road shall be completed to the said point of junction, then the said bonds shall be issued and delivered to the said railroad companies, as is hereinbefore provided; but upon

the fundamental condition, which shall be expressed in the face of said bonds, that the State of Texas shall at any time before the maturity of said bonds, and when the State shall have the power so to dispose of the public lands, have the right to redeem the said bonds, by a grant of the public lands to the holder or holders of said bonds at the rate of fourteen hundred and forty acres for each bond;
157 and if the State shall at any time so redeem the said bonds, there shall be granted and issued to the holder of each bond, upon the surrender of the same to the State, three certificates for lands, two of which shall be for six hundred and forty acres each, and the other for one hundred and sixty acres; and the parties receiving the said certificates, in lieu of a bond surrendered, shall have the right to locate the same upon any part of the then unappropriated public domain, free from all conditions whatsoever, except the payment of such office fees as may be prescribed by law for the issuance of certificates and patents in all other cases.

SECTION 7. If the Legislature shall at any time make provis-ons for the redemption of the said bonds with lands, as is provided for in the next preceding section, the State shall give at least four months' notice to the holders of said bonds, by advertisement published in at least one newspaper of general circulation in the city of New York, and at least two newspapers of general circulation published in the State of Texas, which said newspapers shall be selected by the Governor of the State; which notice shall require the holders of the said bonds to surrender the same at any time within two months after the expiration of the four months advertisement, to the Treasurer of the State for cancellation, provided, that the Treasurer of the State shall in every case receipt to the holder for the bonds so surrendered; and provided further, that bonds so surrendered shall not be cancelled until the land certificates in lieu of said bonds shall be actually delivered to the interested party.

SECTION 8. The said railroad companies shall take no benefit whatever under the provisions of this act, but the same shall be
158 null and void, unless the said railroads shall be completed to the said point of junction by the first day of January, A. D. 1874.

SECTION 9. Nothing in this act contained shall be construed to impair, diminish or in any manner to affect injuriously any right enjoyed by either of the said railroad companies under existing laws.

SECTION 10. Any provision of any former law, inconsistent with the provisions and intent of this act, shall be controlled by the provisions of this act.

SECTION 11. All rights, benefits and privileges, granted and intended to be secured by this act to the Southern Pacific Railroad Company and to the Southern Transcontinental Railway Company, shall pass to and vest in the Texas Pacific Railroad Company, a corporation created by and under the laws of the United States, by an act of Congress, approved March third, A. D. one thousand eight hundred and seventy-one, whenever the said Southern Pacific Railroad Company and the said Southern Transcontinental Railway Company shall have been consolidated with the said Texas Pacific

Railroad Company; and authority is hereby given to the said Southern Pacific Railroad Company, the said Southern Transcontinental Railway Company, and the said Texas Pacific Railroad Company, to consolidate on such lawful terms and conditions as may be agreed upon between the said companies, and be ratified by a majority of the stockholders of each of the corporations, so consolidating; provided, however, that the said Texas Pacific Railroad Company shall take no benefit whatever under or by virtue of this act until the
159 said company shall have fully performed all of the conditions imposed by this act upon the Southern Pacific Railroad Company and the Southern Transcontinental Railway Company.

SECTION 12. This act shall take effect and be in force from and after its passage.

Passed May 24, 1871."

Defendant offers in evidence the special act of the Legislature of the State of Texas, passed November 21, 1871, entitled "An Act amendatory of and supplementary to an act entitled 'An Act to encourage the speedy construction of a railway through the State of Texas to the Pacific Ocean,' passed on the 24th. day of May, 1871." Said act being as follows:

"SECTION 1. Be it enacted by the Legislature of the State of Texas, that section one of the above entitled act shall be so amended as to read as follows:

'SECTION 1. Be it enacted by the Legislature of the State of Texas, that in order to secure and promote the speedy construction of a railway through the State of Texas to the Pacific Ocean, and thereby secure the incidental advantages of cheap transportation for immigrants to the western and unsettled portion of the State, facilities of communication between the eastern and western boundaries, the settlement and enhancement in value of the now unoccupied public domain, and the development of the great mineral, agricultural and stock raising resources of the State, the State of Texas hereby consents, binds and obligates herself to donate, and does hereby grant to the Southern Pacific Railroad Company and to the Southern Transcontinental Railway Company, heretofore chartered by the Legislature of the State of Texas, the bonds of the State of Texas to the amount
160 of six millions of dollars, in the manner and upon the terms and conditions following, towit: To the Southern Pacific Railroad Company there are hereby granted the bonds of the State to the amount of three millions of dollars, and to the Southern Transcontinental Railway Company, there are hereby granted the bonds of the State to the amount of three millions of dollars, upon the condition that the said companies shall, before the first day of June, A. D. 1872, agree upon a point of junction of the two roads, which said point of junction shall be within three miles of the junction of the West Fork and Clear Fork of the Trinity River, and on the south side of said rivers, and shall file such agreement, duly executed by the two companies, in the form of an indenture between the two companies, in the office of the Secretary of State of the State of Texas. The said Southern Pacific Railroad Company shall build its road from the present western terminus thereof at Longview, in

Upshur County, by such route as the said company may deem the most practicable, crossing the Central Railroad within one mile of Browder's Spring, to the said point of junction; and the said Southern Transcontinental Railway Company shall build its road from Jefferson to a point on the eastern boundary of the State of Texas, bordering on the State of Arkansas, at or near Texarkana, and thence through the town of Clarksville, in Red River County, and through the City of Paris, in Lamar County, to the point of junction, confining its line as near as may be practicable to the old survey of the Memphis, El Paso & Pacific Railroad Company, and for the purpose of more certainly and conveniently transporting the material necessary to the construction of its said road, as above defined, the
161 said Southern Transcontinental Railway Company shall have the right to construct a railway from the town of Marshall, in Harrison County, to Jefferson, which shall be a part of the railway of the said company; provided, that the said company shall not be entitled to apply any part of the subsidy herein granted to the said road from Marshall to Jefferson. The said companies by the first of September, 1872, shall make a survey of the route of each of the said roads to the said point of junction, and shall file a map of said route in the General Land Office at Austin, and in the office of the Secretary of State, and the distances between the principal points along said routes to the said point of junction shall be carefully noted on said maps.'

SECTION 2. That section four of said act be so amended as to read as follows: 'The bonds hereinbefore provided for shall be issued and delivered to the said railroad companies, or either of them, which may be entitled to receive the same, in the following manner, towit: When either of said companies shall complete, equip and put in running order twenty-five consecutive miles of its said line of road, and the chief engineer of said company shall certify the same to the Governor of the State, under oath, it shall then be the duty of the Governor to detail such officers as may be prescribed by law, or appointed by the Governor for that purpose, to examine the same, and upon the written report of such officer that the said twenty-five miles of such railroad have been completed in a thorough and substantial manner, it shall then be the duty of the Governor to issue and deliver to the said company the bonds herein provided for to the amount of ten thousand dollars per mile for each and every
162 mile of said twenty-five miles of said road. Then and thereafter, so soon and so often as said companies, or either of them, shall complete ten miles of their road, and equip and put the same in running order, it shall be the duty of the Governor to deliver to said companies, respectively, the bonds hereinbefore provided, at the rate of ten thousand dollars per mile for each and every mile of the said roads, in like manner and under the same restrictions as hereinbefore provided, until the said roads shall be completed to said point of junction.'

SECTION 3. That section five of said act be so amended as to read as follows: 'That the Legislature of the State of Texas, if vested with the constitutional power to do so, may, at any time before the first

day of January, A. D. 1874, substitute for the bonds hereinbefore donated a grant of the public lands of the State, to the amount of twenty-four sections to the mile to each of said companies, respectively, for each and every mile of road built by said companies, respectively, after the passage of this act, in lieu of said bonds, in like manner and under the same restrictions as provided in this act; provided, that if any of the bonds herein provided for shall be issued before the Legislature shall make such substitution, then said bonds shall be redeemed and canceled, as provided in section six and seven of this act; and provided further, that if the Legislature shall not have made such substitution of lands for the said bonds by the first day of January, 1874, then the said company shall have the right, at any time thereafter, when the Legislature shall have the power to grant the public lands in aid of internal improvements, to deliver to the Governor of the State any bonds which may have been
163 delivered to them under the provisions of this act, and shall receive therefor a grant of the public lands to the amount and in the manner provided in section six of this act.'

SECTION 4. That section eight of said act shall be amended so as to read as follows: 'That should either of said companies fail to complete its road to the said point of junction by the first day of January, 1874, then said companies shall thereafter take no further benefit under the provisions of this act.'

SECTION 5. That the said Southern Pacific Railroad Company and the Southern Transcontinental Railway Company are hereby empowered to conform the gauge of their several roads to such gauge as may be adopted by the Texas Pacific Railroad Company, chartered under act of Congress of the United States, March 3, 1871.

SECTION 6. That it is the intent and purpose of this act, and of the act to which this act is amendatory, that each of the said railroad companies shall be entitled to three millions of dollars of said bonds, and that neither of said companies shall receive more than ten thousand dollars per mile for the construction of their roads to the said point of junction, and the said companies shall be entitled to receive ten thousand dollars per mile for a single track railroad westward from the point of junction towards El Paso, until the whole amount of bonds granted shall be consumed, but in no event shall the amount of bonds to be issued under the provisions of the act of which this act is amendatory, exceed six millions of dollars; provided, that the said companies, after reaching the said point of junction, shall construct the single track westward towards El Paso at the rate of one hundred miles per annum, until the whole amount of
164 the subsidy shall be exhausted; failing to do which the said companies shall forfeit all right to any subsidy beyond the said point of junction.

SECTION 7. The said railroad companies shall be subject to no limitation of time in the constrution of their roads, other than is provided in this act, and the act of which this act is amendatory.

SECTION 8. Anything contained in the act of which this act is amendatory, and in other laws or parts of laws contrary to or incon-

sistent with the provisions of this act, is hereby repealed, and this act shall take effect from and after its passage.

Passed November 21, 1871."

Defendant offers in evidence deed of conveyance from the Southern Pacific Railroad Company to the Texas Pacific Railroad Company, said deed being of date March 21, 1872, as follows:

"This indenture, made the twenty-first day of March, in the year one thousand, eight hundred and seventy-two, between the Southern Pacific Railroad Company, a corporation created by and under the laws of the State of Texas, party of the first part, and the Texas Pacific Railroad Company, a corporation created by and under the laws of the United States, party of the second part, witnesseth: That the said party of the first part, in consideration of the sum of three million dollars, lawful money of the United States, in hand paid at or before the ensealing and delivery of these presents, in the manner hereinafter stated, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents, do grant, bargain, sell, alien, remise, release, assign, transfer, convey and confirm unto the
165 party of the second part, and to their successors and assigns all the franchises, track, roadbed, lands, buildings, rolling stock, engines, tools, bonds, stocks, grants, privileges, property, real and personal, and every right, title and interest in and to any franchise or property, real or personal, and all rights of every name and kind, which the party of the first part possesses, and in which the party of the first part has any right, privilege or interest, situate and being in the States of Texas, Louisiana and elsewhere.

To have and to hold the same, with all the appurtenances, unto the said party of the second part, their successors and assigns forever. The object and purpose of this indenture being to consolidate the said corporations into one, by the sale of the Southern Pacific Railroad Company and all its property, rights and franchises unto the said Texas Pacific Railroad Company, so that the two corporations, thus consolidated in accordance with the laws under which they were created, may become one, by merging the said Southern Pacific Railroad Company into the said Texas Pacific Railroad Company.

The consideration above mentioned is to be three millions of dollars of seven per cent. land-grant bonds, which are to be a part of those secured by mortgage on all the lands that the consolidated Texas Pacific Railroad Company will own and control within the State of Texas, whether coming from the Southern Pacific Railroad Company, the Southern Transcontinental Railway Company, of the State of Texas, or from any other source whatsoever; provided, said lands are situated in the State of Texas. The said land-grant
166 bonds have forty years to run from July 1, 1872, and are to be convertible at the option of the holder, within two years after their date, into eight per cent. bonds of the State of Texas, issued by said State to the said Southern Pacific Railroad Company, and to the said Southern Transcontinental Railway Company, or into the land certificates of the State of Texas, which the Texas Pacific Railroad Company may then hold, instead of said Texas bonds. And the

said Texas Pacific Railroad Company hereby assumes the floating debt of the said Southern Pacific Railroad Company, not to exceed in amount the sum of seven hundred thousand dollars; and also assumes the debt of said company due to the State of Texas, not to exceed the sum of two hundred and fifty thousand dollars.

And the parties of the first and second parts, by these presents, do hereby consolidate and become one railroad, under the corporate name of The Texas Pacific Railroad Company.

In witness whereof, the parties hereunto have mutually executed this indenture under the corporate seals of the said companies, and attested by the signatures of the proper officers of the same, the day and year first above written.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
By THOMAS A. SCOTT, *President.*

JNO. P. GREEN,
Secretary Pro Tem.

THE TEXAS PACIFIC RAILROAD COMPANY,
By THOMAS A. SCOTT, *President.*

E. B. HART, *Secretary.*"

Defendant offers in evidence deed of conveyance from The Southern Transcontinental Railway Company to the Texas Pacific
167 Railroad Company of date March 30, 1872; said deed being as follows:

"This Indenture, made the 30th day of March, in the year one thousand eight hundred and seventy-two, between The Southern Transcontinental Railway Company, a corporation created by and under the laws of the State of Texas, party of the first part, and the Texas Pacific Railroad Company, a corporation created by and under the laws of the United States, party of the second part; witnesseth:

That the said party of the first part, in consideration of the sum of one million dollars, lawful money of the United States, in hand paid at or before the ensealing and delivery of these presents, in the manner hereinafter stated, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, assigned, transferred, remised, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, assign, transfer, convey and confirm unto the party of the second part, and to their successors and assigns, all the franchises, track, roadbed, lands, buildings, rolling stock, engines, tools, bonds, stocks, grants, privileges, property, real and personal, and every right, title and interest in or to any franchise or property, real or personal, and all rights of every name and kind which the party of the first part possesses, or in which the party of the first part has any right, privilege or interest, situate and being in the States of Texas, Louisiana, Arkansas or elsewhere.

To have and to hold the same, with all the appurtenances, unto

the said party of the second part, their successors and as-
168 signs forever; the object and purpose of this indenture being to consolidate the said corporations into one, by the sale of The Southern Transcontinental Railway Company and all of its property, rights and franchises, unto the said Texas Pacific Railroad Company, so that the two corporations thus consolidated, in accordance with the laws under which they were created, may become one by merging the said Southern Transcontinental Railway Company into the said Texas Pacific Railroad Company. The consideration above mentioned is to be one million of dollars of 7 per cent. land-grant bonds of the Texas Pacific Railroad Company, which are to be a part of those secured by mortgage on all the lands that the consolidated Texas Pacific Railroad Company will own and control within the State of Texas whether coming from the Southern Pacific Railroad Company, The Southern Transcontinental Railway Company, the State of Texas, or from any other source whatsoever; provided, said lands are situated in the State of Texas. The said land-grant bonds have forty years to run from July 1, 1872, and are to be convertible at the option of the holder, within two years from their date, into 8 per cent. bonds of the State of Texas, issued by said State to the said Texas Pacific Railroad Company, or into the land certificates of the State of Texas which the Texas Pacific Railroad Company may then hold, instead of the said Texas bonds, in consideration of the building of the line from Texarkana to a point of junction at or near Fort Worth, in said State of Texas, the said Southern Transcontinental Railway Company to be free and clear of all debts and obligations of every nature and kind whatever, except for expenditures incurred and
169 made in the construction of the Sulphur River bridge on said line, and engineering expenses incident to survey since January 1, 1872. And the parties of the first and second parts, by these presents, do hereby consolidate and become one railroad, under the corporate name of The Texas Pacific Railroad Company.

In testimony whereof, the parties hereunto have mutually executed this indenture under the corporate seals of the said companies, and attested by the signatures of the proper officers of the same.

THE SOUTHERN TRANSCONTINENTAL RAILWAY COMPANY.
By THOMAS A. SCOTT, *President.*

E. B. HART, *Secretary.*

THE TEXAS PACIFIC RAILROAD COMPANY.
By THOMAS A. SCOTT, *President.*

E. B. HART, *Secretary.*"

Defendant offers in evidence the Act of the Legislature of Texas, passed May 2, 1873, entitled "An Act to adjust and define the rights of the Texas & Pacific Railway Company within the state of Texas,

in order to encourage the speedy construction of a railway through the State to the Pacific Ocean;" said act being as follows:

"Whereas, By the terms and conditions of an act entitled 'An Act to encourage the speedy construction of a railway through Texas to the Pacific Ocean,' passed May 24, 1871, and an act supplementary and amendatory thereto, passed November 21, 1871, authority was given to the Southern Transcontinental Railway Company and to the Southern Pacific Railroad Company, incorporations created by acts of the Legislature of the State of Texas, to become consolidated with the Texas Pacific Railroad Company, an incorporation created by an Act of the Congress of the United States; and,

170 Whereas, It appears from documentary evidence on file in the office of the Secretary of State of the State of Texas that such consolidation has been effected, and as a difference of opinion may arise as to the construction of the acts of the Legislature hereinbefore referred to, in regard to the amount of lands to which said Texas & Pacific Railway Company may be entitled under the said acts of incorporation, and other laws of this State; and,

Whereas, It is desirable that there should be a complete and final adjustment of the rights of said Texas & Pacific Railway Company, as the assignee and successor of the said Southern Pacific Railroad Company and the Southern Transcontinental Railway Company, under the laws of this State, and a definite understanding as to the obligations of the State; and to the further end that said company be encouraged to the speedy construction of said railway; therefore,

SECTION 1. Be it enacted by the Legislature of the State of Texas, that the Texas & Pacific Railway Company, a corporation created by an Act of the Congress of the United States, as the successor of the Southern Transcontinental Railway Company, a corporation created by an Act of the Legislature of the State of Texas, approved July 27, 1870, shall construct its road from the town of Marshall, in Harrison county, to the city of Jefferson; thence in a northerly direction to a point in Bowie county, not exceeding six miles west of Texarkana, at which point to intersect with its main line, which shall be constructed from or near Texarkana, on the Arkansas line, through the towns of Clarksville, Paris, Honey Grove, Bon-

171 ham and to Sherman by the first day of July, 1874; thence through the towns of Pilot Point and Denton to the point of junction with the Southern Pacific Railroad line at Fort Worth by the first day of January, A. D. 1875; and shall erect passenger and freight depots within one-half mile of the business portions of said towns; provided, said towns, respectively, shall donate to said company the necessary lands for the right of way, side tracks, switches and depot buildings, not to exceed in each case twenty acres; provided, that said depots shall be erected in the towns of Bonham, Sherman, Pilot Point and Denton upon the grounds now agreed upon and donated to said railroad company by said towns; and, provided further, that said railway company shall commence the grading of their railroad in the county of Denton within ninety

days from the passage of this act, and shall continuously prosecute the same until the said road shall be graded between the towns of Sherman and Fort Worth. And the said Texas & Pacific Railway Company, as the successor of the Southern Pacific Railroad Company, a corporation created by the laws of the State of Texas, shall construct its road from its present western terminus at Longview, in Upshur county, as now located, through the town of Dallas, to the point of junction at Fort Worth, by the first day of July, 1874; and said Texas & Pacific Railway Company shall construct a single-track railroad from the said point of junction at Fort Worth, westwardly, on the most practicable route, to a point not less than one-fourth nor more than one-half mile from the courthouse in the town of Weatherford, in Parker county, at which point said company shall establish and maintain a freight and passenger depot; provided, it shall not be obligatory upon said company to go by said
172 town and establish said depot, in the event the said town of Weatherford fails to give said company, free of charge, twenty-five acres of land, the same to be designated by the said company, for the purpose of depot buildings, tracks, sidings, switches and turnouts; and also give, free of charge, the right of way through the said town, and a tract of twenty-five acres of land, situated on the line of said railroad and within one and a half miles of the courthouse in said town; and thence westwardly on the most practicable route to the Rio Grande River, at a point in the county of El Paso, opposite the town of El Paso, in Mexico; and said single-track railroad shall be constructed from the said point of junction at Fort Worth at the rate of one hundred miles per annum, until it reaches the Rio Grande River; provided, said road be completed and put in running order, to the main line of the Transcontinental road near Texarkana, or from such point on said line as the railroad now being constructed from Little Rock to a junction with said Transcontinental road may cross the Arkansas State line, the same not being more than seven (7) miles north of Texarkana, by January, 1874; and shall build and maintain a depot within one-half mile of the town of Clarksville, in Red River county.

SECTION 2. That the State of Texas hereby grants and donates to the said Texas & Pacific Railway Company twenty sections of land of six hundred and forty acres each for every mile of its road completed in good, substantial running order in the State of Texas; that is to say, on the branch road from Marshall to Jefferson, by August, 1873, and from Jefferson to the main line of the Southern Transcontinental road, in Bowie county, and from or near Tex-
173 arkana, or to the point of junction of the Transcontinental road, on the Arkansas State line, with the railroad now being constructed from Little Rock; thence to Fort Worth, and from Longview to Fort Worth, and from Fort Worth to the Rio Grande River, opposite El Paso, in Mexico; provided, the said road shall be constructed from Marshall, by Jefferson, on the line hereinbefore designated, to Sherman, by the first day of July, 1874, and the grading be commenced in the county of Denton within ninety days from the passage of this act, and be continuously prosecuted until the said

grade is finished between Sherman and Fort Worth, and the road completed and put in running order to Fort Worth by the first day of January, 1875; and the road from Longview to Fort Worth shall be completed and put in running order by the first day of July, 1874, and the single-track road westward from Fort Worth to the Rio Grande, after the first day of January, 1875, shall be constructed and put in running order at the rate of one hundred miles annually; and, further provided, that should said company fail to complete either of its lines within the manner and time hereinbefore prescribed, to the point of junction, it shall thereafter forfeit all right to any donations of land, or reservation of lands, except upon its completed road; and should said company fail to construct its single track westward from the point of junction at Fort Worth, in the time required, it shall forfeit all its rights to donations or reservations of land, except upon the portion thereof completed; provided, that in no case shall the State be in any way liable for deficiency of vacant domain.

SECTION 3. That whenever, and as often as said Texas & Pacific Railway Company shall complete and put in running order
174 a section of ten miles or more of either line of its road, or of its single-track road, as hereinbefore designated, the said company shall give notice thereof to the Governor of the State, and it shall be his duty to appoint some skillful engineer, if there be no State engineer, to examine said completed road and make report thereon, under oath, to him. It shall then be his duty, if the same is shown to have been constructed in accordance with its charter, and as required by law, to report the fact to the Commissioner of the General Land Office; thereupon, it shall be the duty of the Commissioner of the General Land Office to issue to said company twenty certificates for six hundred and forty (640) acres of land, for each and every mile of road so completed. That all land certificates that shall issue to said company, under the provisions of this act, shall be located and surveyed in alternate sections; that is to say, said company shall cause to be surveyed two sections of six hundred and forty (640) acres each, for each certificate, adjoining, and shall return to the General Land Office the field notes and maps on the same, and the Commissioner of the General Land Office shall thereupon number said sections so surveyed, and shall cause to be issued to said company, or its assignees, patents to the odd sections, the even sections being reserved to the State for the school fund; provided, that when fractions of land of a less size than twelve hundred and eighty (1280) acres, by reason of previous surveys, are found, the same may be located, by virtue of said railroad certificates, in equal quantities; and, it shall be the duty of the Commissioner of the General Land Office to designate the same as other railroad certificates, and to patent one-half thereof to the company, or its assignees, and one-half
175 to the State, and the residue of said certificates may be, in like manner, located elsewhere, until the same is exhausted, the State being entitled to one-half of each survey, and the company to the other half; provided, that the grant of land herein made shall not be construed to give to said company a greater number of acres

of land than the amount or number of acres computed as herein provided for the number of miles of road within the State of Texas.

SECTION 4. That said company shall alienate the lands hereby granted and donated, except so far as may be necessary for the ordinary uses and operating said road, as follows, towit: One-fourth thereof in eight years, one-fourth in twelve years, one-fourth in sixteen years, and the remaining fourth in twenty years from the date of the issuance of the certificates, in such manner that the whole of such lands shall pass out of the hands of said company within twenty years after the date of the certificates; provided, that said lands shall not be alienated to any other railroad corporation, except so far as may be necessary for the proper use and the conducting of the business of such corporation; nor to any person, firm or company in trust for said railroad company, or to any company or firm of which any officer or stockholder of said railroad company is a member; and the violation of this provision shall work a forfeiture of the rights conferred by this act; and on failure to comply with the provisions of this section and the general laws of the State on this subject, or a volation of the provisions of this section, or said general laws, the said company shall forfeit all right to lands secured by this act, not alienated as required by law.

176 SECTION 5. That the public lands heretofore reserved from preemption, location and survey, for the benefit of the Memphis, El Paso & Pacific Railroad Company, in what is known as the Memphis, El Paso & Pacific Railroad reservation, and as designated by the maps, plats and field notes now on file in the General Land Office, commencing on the eastern boundary line of the State, in Bowie county, and thence westwardly to the twenty-third meridian of longitude west from Washington, are hereby continued to be reserved from pre-emption, location or survey by the holder of any land certificate or other land claim, for the benefit of the said Texas & Pacific Railway Company, and for the benefit of the school fund; and wherever the public lands therein have not already been sectionized, said company shall sectionize the same and return the field notes and maps to the General Land Office, as heretofore required, giving to the company the odd section, and to the school fund the even section; and said company is hereby authorized to apply any of the certificates, to which it may be entitled under the provisions of this act, to the odd sections within said reservation; provided, that nothing herein contained shall be so construed to affect or impair the legal rights of third persons; and, further provided, that this reservation shall continue in force until the first day of January, 1876, and no longer.

SECTION 6. That the said Memphis & El Paso reservation, from the twenty-third meridian of longitude west from Washington to the Rio Grande River, as designated by the field notes, maps and reports from the different surveyers of the several lands districts of the State on file in the General Land Office, is hereby continued to be

177 set aside and reserved from pre-emption, location and survey for the benefit of said Texas & Pacific Railway Company, and the school fund; and there is also hereby set aside for the same pur-

pose, out of the public lands, such additional width of territory on each side of the said sixteen miles of reservation, as will make eighty miles in width from the twenty-third meridian of longitude west, to the east boundary line of New Mexico, and to a point south of the southeast corner of said territory of New Mexico; that is to say, taking the center line of said Memphis & El Paso reservation and extending forty miles on either side thereof; and after reaching the said point south of and opposite to the southeast corner of New Mexico, the said reservation of the unappropriated public domain is hereby continued eighty miles in width, extending westward to the Rio Grande, and bounded on the north by New Mexico, the same to include the Memphis & El Paso reservation hereinbefore mentioned, which said reservation, as herein continued and set apart, shall continue to be so reserved and set apart for the purposes herein mentioned until the year 1880, and no longer; provided, that nothing in this section contained shall impair or affect the rights of any person or persons heretofore legally acquired within said reservations; and, provided, that the State of Texas shall have the right to grant the right of way, not to exceed two hundred feet in width, to any other railroad company, through or across said reservation, so long as the fee remains in the State, and to cross and connect with the road herein to be constructed.

SECTION 7. That the Commissioner of the General Land Office shall designate upon the maps of his office the reservations
178 herein continued and created, from the twenty-third meridian of longitude west from Washington to the Rio Grande River.

SECTION 8. That the certificates of land to which said Texas & Pacific Railway Company may be entitled under the provisions of this act shall be located within the reservations hereinbefore continued and located, except one thousand certificates of six hundred and forty (640) acres each, to be issued to said company by the Commissioner of the General Land Office upon such portion of completed road as it may designate, and which certificates may be located upon any of the public domain of this State, subject to location, not included within said reservations; and, provided further, that in case there is not a sufficient quantity of unappropriated public lands within said reservations to satisfy the remainder of the certificates to which said company may be entitled, with the corresponding sections belonging to the school fund, then, and in that event, said company shall have the right to locate the balance of said certificates, with the corresponding sections for the common school fund, upon any of the unappropriated public domain of this State, subject to location; provided, that the State of Texas shall not be held responsible for any deficit of public lands upon which to locate said certificates; and no land certificate issued under the provisions of this act, which may not be located by reason of the exhaustion of the public domain, shall ever constitute any claim against the State.

SECTION 9. That the above grants, donations and reservations are made to the said Texas & Pacific Railway Company, a corporation

created by an Act of Congress of the United States, approved
179 March 3, 1871, as the assignee of and successor to the rights, privileges and franchises of the Southern Transcontinental and the Southern Pacific Railroad Companies, corporations created by the laws of Texas, with the intent and distinct understanding that the same shall be accepted by said Texas & Pacific Railway Company in full satisfaction of any claims for money, bonds or lands to which said company might be entitled under the act entitled 'An Act to encourage the speedy construction of a railway through the State of Texas to the Pacific Ocean,' passed May 24, 1871, and 'An act amendatory of and supplementary' thereto, passed November 21, 1871, or by virtue of the consolidation of said Texas & Pacific Railway Company with the Southern Transcontinental Railway Company and the Southern Pacific Railroad Company, or by virtue of the charters of either of said railroad companies, or by virtue of any railroad franchise granted by the State of Texas, purchased or acquired by either of said companies or by the Texas & Pacific Railway Company, or by virtue of any general or special law of this State, and in full satisfaction of all claims or demands for bonds, lands or money of said Southern Pacific and Southern Transcontinental Railroad Companies against the State of Texas; and said Texas & Pacific Railway Company shall be subject to such general laws as may be enacted by the Legislature, applicable to other railroads, constructed within the State; and that all the property of the said corporations or either of them, now or hereafter situated in this State, shall be hereafter subject to taxation by the laws of this State.

SECTION 10. That all railroads in this State, constructed,
180 or that may be hereafter constructed, to intersect said Texas Pacific Railroad, shall have the right to connect with that line; that no discrimination in regard to charges for freight or passengers, or in any other matter, shall be made by said Texas Pacific Railroad Company against any of the said connecting roads; but that the charges per mile as to passengers and freight, passing from the said Texas Pacific Railroad over any of said connecting roads, or passing from any of said connecting roads over any part of said Texas Pacific Railroad, shall be governed and controlled by the laws of this State, now or hereafter to be enacted; provided, that said connecting road or roads shall not discriminate in their charges for freight and passengers against said Texas & Pacific Railway Company, but shall carry the same at the same rate and charges as said railroad company or companies carry their own freight and passengers; and said railroad company shall not have the right or power to consolidate with or sell, rent or lease the same to any other railroad in this State, or to purchase or lease, nor enter into any combination in the nature of a partnership with any railroad in this State running parallel with the said Texas & Pacific Railroad, or in the same general direction, that would in any way or manner give said company the power or right to control the rates of freight and passage on said road so purchased or leased; and should the provisions of this section be violated by said company, it shall work a forfeiture of the rights and privileges herein granted.

SECTION 11. That said Texas & Pacific Railway Company, by their Board of Directors, shall, within fifteen days from the date of approval of this act, signify to the Governor, by telegraph or
181 otherwise, the acceptance or rejection of the terms and conditions of this act; and within thirty days from the date of approval of this act shall file a formal acceptance or rejection of the same with the Secretary of State of the State of Texas.

SECTION 12. That all laws and parts of laws in conflict or inconsistent with the terms and provisions of this act, be and the same are hereby repealed.

SECTION 13. That this act take effect and be in force from and after its passage.

Passed May 2, 1873."

It is admitted that the Texas & Pacific Railway Company has a line of road within the State of Texas and within the States of Arkansas and Louisiana.

T. J. FREEMAN, a witness on behalf of defendant, testified as follows:

I have been General Attorney of the T. & P. a little over thirteen years. Since the organization of the Railroad Commission, I have given very large consideration to the subject of traffic and transportation and competitive freight conditions in Texas. The T. & P. is competitive, both for freight and passenger traffic, with the various other railroads involved in this controversy, on both State and interstate traffic; State traffic at all junction points; interstate traffic, you might say, from every point in the United States; was so during the year ending June 30, 1905, and is so now.

The North Texas Traction Company was incorporated under the general laws of the State of Texas, to operate an electric line of road between Dallas and Fort Worth, a distance of about thirty-four miles, paralleling the line of the T. & P. between those points.
182 I will say that I have personally investigated the question as to the character of traffic it handles; that it handles passengers, express and baggage to a very large extent, and with the T. & P. in active competition between Fort Worth and Dallas, and also in active competition with what we term the "Rock Island" road; that they handle both passengers, baggage and express under the terms of their articles of incorporation. I further beg to say that under the term "express" I find from my practical knowledge of the matter and the way it is meant in Texas, that anything can move as express in Texas that can be moved as freight or baggage; that there is no limitation by law or by practice or by custom as to what constitutes express matter, as contradistinguished from any other class of freight or commodity that can be moved by a railroad company; that the railroad companies themselves move as express everything that they can possibly move as freight; to illustrate, they move pieces of machinery, castings weighing several tons, and horses, both in carloads and less than carloads, and both dead freight and live freight are moved by the railway companies as express; also fruit and vegetables in large quantities, carloads and less than carloads. That the North Texas Trac-

tion Company, under its charter, is authorized, under the term "express" to move everything that can be moved by the railroad companies, and is especially given authority to move all stuffs, intended for market, like fruits, vegetables and perishable stuffs, and is moving such stuff every day, in competition with the line of the T. & P. between Fort Worth and Dallas. The North Texas Traction Company is also in competition with the Santa Fe between Fort
183 Worth and Dallas. This traction company is commonly known as the "Interurban" between Dallas and Fort Worth. This company has cut the local passenger rate between those points about half, I think it; it has cut it from ninety-five cents to seventy cents on the round trip; on mileage ticket it has cut it about half in two. Those conditions existed from June 30, 1904, to June 30, 1905, prior to that time and are existing now. I want to further state in this connection, that the Railroad Commission of Texas authorized the T. & P., upon its application, to meet the competition of this line, and to reduce our passenger rates in order to meet that competition. The North Texas Traction Company between Dallas and Fort Worth is an electric road, and it has half a dozen stations or more between those two points. By "station" I mean a place to get off and get on, and to receive baggage and passengers, if they want to. The stations are limited only to the necessities of that road; they are not so large as the stations on other railroads, they are little stations. That road has regular stations for stopping. I am not familiar with how many stations they have for stopping, but there are four fixed stations they stop at that I know, and they have other stops in between there. As to whether that interurban road is under the jurisdiction of the Railroad Commission, I am not prepared to say. The Railroad Commission has not attempted to take jurisdiction over it; they decided they didn't have jurisdiction over the interurban road between Sherman and Denison, and the Supreme Court declined to mandamus them, on the ground they had no power over the Commission. The Commission refused to take jurisdiction of the Sherman road for the purpose of bringing it within
the provisions of the stock and bond law. The act of the
184 North Texas Traction Company gives the Railroad Commission jurisdiction over the issuance of the stocks and bonds of that road, but provides they shall not have jurisdiction over the road otherwise, unless it handles freight. That is one reason I am calling the court's attention to the fact that it is given express power and authority to haul express, and by the term "express," everything can be hauled that can be hauled as freight.

I think the T. & P. has 1130.16 miles of road in Texas; it is set out to the fraction in the report to the Comptroller. It has about 71 miles of road in Arkansas; Arkansas and Louisiana together, the balance of it, is 696.49 miles. The Texas mileage and the Arkansas and Louisiana mileage in the aggregate constitute the whole mileage of the T. & P. The general managing offices of the company are in Dallas, Texas; it is not so provided in the charter; they were moved at one time from Marshall to Dallas. The general managing offices never have been located elsewhere but in Texas, but what we

call the principal or executive offices have never been in Texas, they are in New York, and are provided for practically in the charter. The reports from all the mileage of the system, both in Arkansas and Louisiana and also in Texas, are made direct to the general offices at Dallas, through the regular channels. In connection with that, I will state that the T. & P. road runs from a point called Sierra Blanca in the extreme west, where it connects with the Southern Pacific, to Marshall, and from Marshall to Shreveport, and from Shreveport to New Orleans. That New Orleans line was acquired by virtue of consolidations with the old New Orleans & Pacific, which was approved and ratified both by act of
185 Congress and act of the Louisiana Legislature. That entire line of the T. & P. is New Orleans at the southern terminal and El Paso at its extreme western terminal. It runs then from Marshall to Jefferson. In order to connect up with these special acts, the old Memphis & El Paso and Southern Transcontinental line of the T. & P., commenced, you might say, at Marshall, goes to Texarkana and then runs from Texarkana to Fort Worth, through the towns of Sherman and Clarksville, Denton and Whitesboro, making, you might say, a parallelogram with the main line from Marshall to Fort Worth. From Texarkana to Forth Worth, via Sherman, I think is two hundred and forty-four miles. That is the property that was completed by virtue of the rights acquired from the old Memphis & El Paso and Southern Transcontinental, referred to in these special acts that have been introduced. The balance of the line was built by virtue of the T. & P.'s original federal charter, these other companies being subsequently merged into it by legislative action.

W. H. ABRAMS, a witness on behalf of defendant, testified as follows:

My name is W. H. Abrams; I am in charge of the land and tax department of the T. & P. Road; I have been connected with that department since early in 1874, and in charge of it since the following year, 1875. The T. & P. received lands from the State of Texas for a little over four hundred miles of road constructed by it; that grant included sidings. Almost every certificate issued by the Commissioner of the Land Office included, more or less, so many miles of sidings. The State brought suit originally against the T. & P. and its assignees for the lands that had been
186 obtained on sidings; subsequently the State dismissed as against the T. & P. and continued the suits to final decree as against the assignees of the railway company and recovered judgment; something over two hundred and fifty thousand acres was decreed back to the State. The T. & P. has practically eleven hundred and twenty miles of road in Texas, but no lands were ever obtained by it, except on four hundred and two or four hundred and five miles of road, which included sidings, and long since it was claimed that the remaining unlocated certificates had been barred by limitation. There was issued by the State of Texas something over eight thousand certificates, eight thousand and fifty, perhaps,

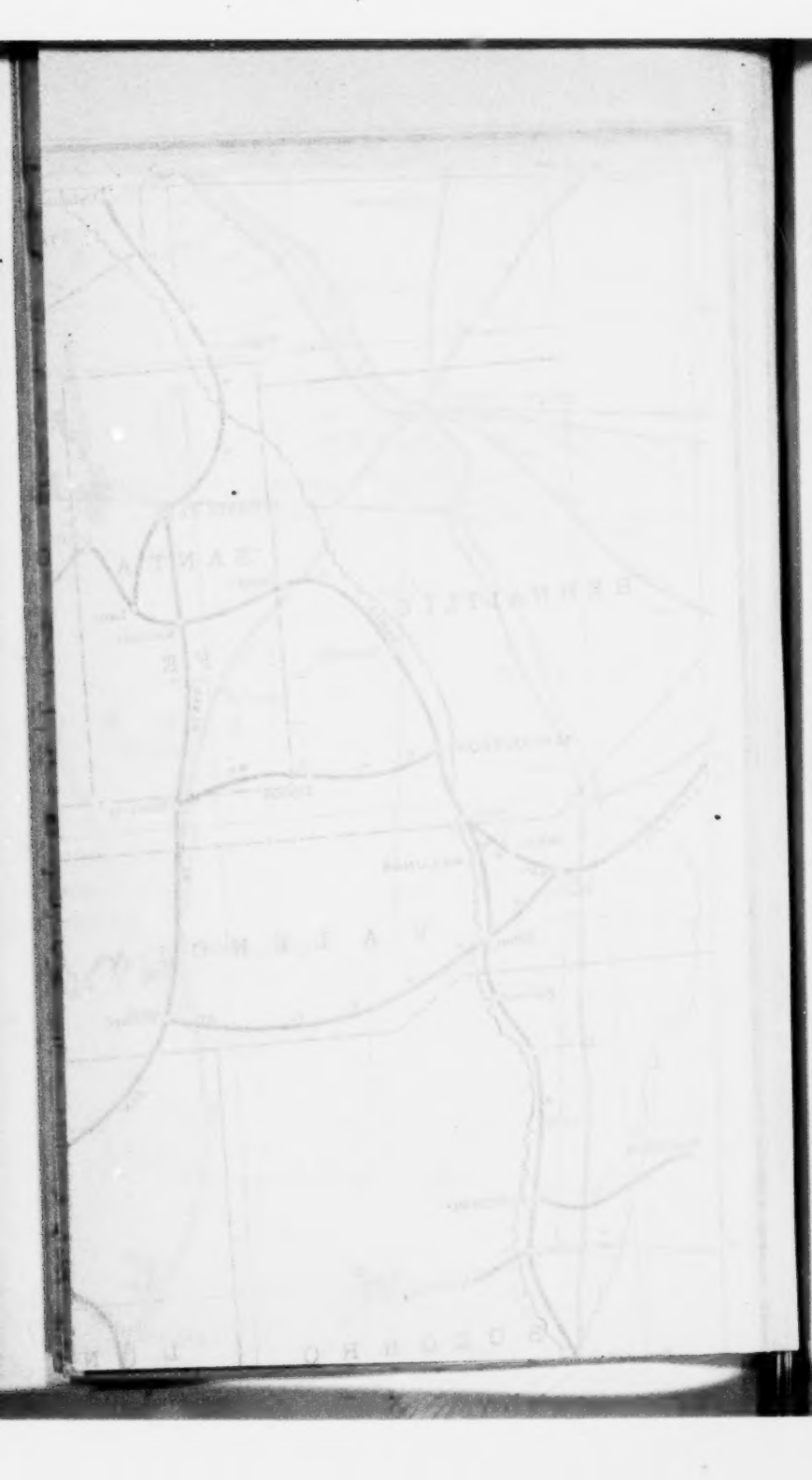
MAPS

TOO

LARGE

FOR

FILMING



New York, Texas & Mexican Railway Company.

Receipts from interstate traffic	$181,020.80
Receipts from intrastate traffic	281,556.09
Unapportioned:	
Mail	12,019.87
Express	8,012.80
Extra Baggage	1,199.12
Switching	586.75
Car service	21,626.76
189 Locomotive mileage	3,435.98
Total	$509,458.17

Gulf, West Texas & Pacific Railway Company.

Receipts from interstate traffic	$31,121.81
Receipts from intrastate traffic	98,142.32
Unapportioned:	
Mail	5,371.17
Express	5,984.30
Extra Baggage	841.33
Switching	1,056.15
Car service	11,155.43
Locomotive mileage	1,838.50
Total	$155,511.01

Galveston, Houston & Northern Railway Company.

Receipts from interstate traffic	$946,057.49
Receipts from intrastate traffic	252,514.95
Unapportioned:	
Mail	6,475.28
Express	5,840.13
Extra Baggage	1,049.35
Switching	18,132.75
Car service	14,717.12
Locomotive mileage	3,330.40
Total	$1,248,117.47

St. Louis Southwestern Railway Company of Texas.

Receipts from intrastate traffic	$1,710,433.85
Receipts from interstate traffic	1,257,220.29
190 Unapportioned:	
Mail	84,708.55
Express	67,468.56
Switching charges	25,982.00
Car service	216,807.15
Hire of equipment	13,083.85
Other items	8,933.92
Miscellaneous	3,086.88
Total	$3,387,725.05

Missouri, Kansas & Texas Railway Company of Texas.

Receipts from intrastate traffic	$4,032,894.45
Receipts from interstate and international	3,883,891.47
Unapportioned:	
Mail	126,717.09
Express	167,748.81
Total	7,916,785.92

Houston & Texas Central Railroad Company.

Receipts from interstate traffic	$2,212,365.94
Receipts from intrastate traffic	2,897,705.33
Unapportioned	290,340.71
Total	$5,400,411.98

Fort Worth & Denver City Railway Company.

Intrastate traffic	$1,105,841.66
Interstate traffic	1,248,182.32
Mail	59,416.12
Express	55,457.34
Car mileage	57,598.30
Total	$2,526,495.74

191 Chicago, Rock Island & Gulf Railway Company.

Intrastate traffic	$257,120.50
Interstate traffic	1,265,698.78
Mail, express, demurrage, car mileage, etc	212,700.99
Total	$1,844,227.80

International & Great Northern Railroad Company.

Intrastate traffic	$2,858,131.49
Interstate traffic	2,952,421.29
Unapportioned—Mail, express, etc	508,308.55
Total	$6,318,861.33

Galveston, Houston & Henderson Railroad Company.

Receipts from interstate traffic	$39,048.85
Receipts from intrastate traffic	223,969.06
Unapportioned	153,142.43
Total	$416,160.34

Houston East & West Texas Railway Company.

Receipts from interstate traffic	$314,255.45
Receipts from intrastate traffic	756,010.14
Unapportioned	36,967.81
Total	$1,107,233.40

St. Louis, San Francisco & Texas Railway Company.

State receipts	$95,918.57
Interstate receipts	501,987.03
Total	$597,905.60

Fort Worth & Rio Grande Railway Company.

State receipts	$531,258.12
Interstate receipts	265,623.14
Total	$796,881.26

192 St. Louis, Brownsville & Mexico Railway Company.

Receipts from interstate business	$43,154.98
Receipts from intrastate business	152,558.28
Receipts, unapportioned	15,675.77
Total	$211,389.03

Texas Midland Railroad.

State receipts	$276,317.51
Interstate receipts	220,990.56
Mail	9,854.52
Express	11,772.47
Miscellaneous	11,356.25
Total	$530,291.31

Gulf, Colorado & Santa Fe Railway Company.

Intrastate traffic	$4,766,549.56
Interstate traffic	4,044,722.27
Unapportioned	291,100.13
Total	$9,102,371.83

Cane Belt Railroad Company.

Intrastate traffic	$164,467.40
Interstate traffic	48,825.99
Unapportioned	16,736.02
Total	$230,019.41

Southern Kansas Railway Company of Texas.

Intrastate traffic	$32,875.06
Interstate traffic	309,519.63
Unapportioned	16,149.09
Total	$358,543.78

193 Pecos & Northern Texas Railway Company.

Intrastate traffic	$51,862.20
Interstate traffic	255,216.62
Unapportioned	4,803.40
Total	$311,884.22

In above statement international is included in interstate receipts.

It is agreed that the affidavits introduced in evidence on the trial of this cause shall be considered as evidence, the same as if the parties making them were present and testifying from the stand.

Defendant rests.

The State's Evidence in Rebuttal.

E. Von Rosenberg, a witness on behalf of the State, testified as follows:

My name is E. Von Rosenberg. I am examining and compiling draftsman of the General Land Office of Texas; have been in that office since January 1, 1877. In my work in that office, I have had occasion to familiarize myself with the lands which have been granted to the Texas & Pacific Railway Company, from the records, and can state what lands have been granted to the T. & P. since the first day of June, 1873, and they are as follows: July 7, 1873, there were 800 certificates issued; August 27, 1873, 250; April 10, 1874, 6; April 22, 1874, 200; August 27, 1874, 1000; October 26, 1874, 500; May 25, 1876, 1836; October 6, 1876, 2952; October 14, 1876,

39; making a total of 8083 of 640 acres each. Of those cer-
194 tificates, there are nine that have not been returned, and they are barred or dead. Five million one hundred and sixty-seven thousand three hundred and sixty acres were represented by the certificates which have been returned; 5,173,120 acres have been granted by the State of Texas to the Texas & Pacific Railway Company, since the first day of June, 1873, as shown by the records of the Land Office. Eight thousand certificates, if the holders were entitled to twenty sections a mile, would be four hundred and four and a fraction miles.

H. G. ASKEW, a witness on behalf of the State testified as follows: My name is H. G. Askew. I am expert accountant of the Railroad Commission of Texas, more generally known as auditor of that Commission; have held that position for fourteen years. I have, in that capacity, the custody of many of the books and papers of the Commission. The Southern Pacific Company makes no report to the Railroad Commission of Texas; it is a foreign corporation, and, so far as I know, the Railroad Commission has no report that is made to it direct by the Southern Pacific Company. I have in my hands the Eighteenth Annual Report of the Southern Pacific Company, made to its stockholders for the year ending June 30, 1902; it is a printed document. A copy of that report was requested by Commissioner Allison Mayfield, of the Southern Pacific Company, or one of its officers, and it was furnished, and that copy was placed in my charge by Commissioner Mayfield for the information of the Commission.

I am familiar with the connection between the Fort Worth
195 & Denver City Railway and the Colorado Southern; they connect at the State line, a little beyond the town of Texline. The Fort Worth & Denver City Railway extends from that point to Fort Worth, without a branch, I believe. I am familiar with the connections between the Chicago, Rock Island & Gulf Railroad and its outside connections. It connects with the Chicago, Rock Island & Pacific at State line in Red River, a few miles this side of Terrell, Indian Territory. It also extends from Washburn, up in the Panhandle of Texas, in an easterly direction and connects with some other road that I understand to be a part and parcel of the Chicago, Rock Island & Pacific, at the line between the State of Texas and Oklahoma Territory on the western edge of Oklahoma and the eastern edge of the Panhandle of Texas. There is still another piece of the Rock Island & Gulf which connects with a road that is either the Chicago, Rock Island & Pacific, or a road that is under its control, at the State line, the northern edge of the Panhandle of Texas and the southern edge of Beaver county, Oklahoma, and extends in a southwesterly direction, passing through Delhart and passing the Fort Worth & Denver City at that point, and connects with another Chicago, Rock Island & Pacific line on the western edge of the Panhandle of Texas and the eastern edge of the Territory of New Mexico, at a place called Bravo; in other words, that line is a connecting link between the line to the northeast and the line to the

southwest, both of which, I understand, are Chicago, Rock Island
196 line exterior to Texas; that is a branch wholly within the state of Texas. The Chicago, Rock Island & Gulf Railroad is a factor in the transportation of interstate commerce, I should say, between points outside of Texas and points inside of Texas, and through the State of Texas. I should also say that the same is true of the Fort Worth & Denver City. In fact, I know of business passing over the Fort Worth & Denver City, passing through the State.

The Gulf, Colorado & Santa Fe connects with the Atchison, Topeka & Santa Fe at Purcell, Indian Territory. I don't know personally that the A., T. & S. F. runs to California and Chicago, and connects generally with the railroad system of the United States, but that is my understanding; I have never been to Chicago over it, nor to California over it. The Texas & Pacific connects with the Iron Mountain at Texarkana, and has a line of its own to New Orleans. The Iron Mountain runs from Texarkana to St. Louis and other points. The M., K. & T. of Texas connects with the M., K. & T. of Kansas at the State line, a few miles north of Denison, and the M., K. & T. of Kansas runs to St. Louis and other points. The Houston & Texas Central Railroad connects with all these lines that have been mentioned, the T. & P., Rock Island and M., K. & T. The Houston East & West Texas has a line extending from Houston to State line at or adjacent to Logansport, Louisiana. I don't know the relation of its connection at that point, but there is a continuous line from there to Shreveport Louisiana. The Texas & New Orleans runs from Houston to a point at or near a place called Echo, on the Sabine River, where it connects
197 with the Louisiana Western, which later on connects with Morgan's Louisiana & Texas, which runs into New Orleans. The International & Great Northern runs from Longview on the T. & P. to Laredo, Texas, where it connects with the Mexican National. The Galveston, Harrisburg & San Antonio Railway runs from Houston to El Paso, where it connects with a Mexican road, and also connects with a road running to California at the State line, which is some four or five miles beyond El Paso. I know from the general maps of the country that the A., T. & S. F. runs to Chicago; and, by personal knowledge, I know that it extends down from the city of Santa Fe, New Mexico, to the line between the Territory of New Mexico and the State of Texas, some twelve miles north of El Paso, and at the present time the A., T. & S. F. operates that twelve miles under a lease approved by the Railroad Commission of Texas. I know, part from general knowledge and part from personal knowledge, that the Southern Kansas connects with the A., T. & S. F. at a point near State line, and runs from there down to Washburn, where it connects with the Fort Worth & Denver. The Pecos and Northern Texas runs from a point on the Fort Worth & Denver, and connects at the State line with the Pecos Valley of New Mexico, and the Pecos Valley of New Mexico runs from one

point on the State line to another point on the Texas State line, where it connects with the Pecos River Railroad which runs into
roads are so located, with reference to other lines, that through freight can pass from any point in Texas to any other place in the United States and Canada, where there is a railroad. I know
198 from personal knowledge that there is a very large amount of business that comes from Kansas by these railroads to Galveston, and is there shipped to foreign countries; I don't know so much about business from Colorado. They also haul considerable amounts from Oklahoma and Indian Territories to Galveston, which is there exported to other countries. I know, in a general way, that there is a very large cattle movement from Texas to other States, and also a very large lumber movement. The M., K. & T. of Texas, in addition to connecting at Denison with the Kansas Company, connects at the Louisiana boundary line with the railroad that runs into Shreveport; they operate, under a lease, the road, some twenty-one miles in length, reaching from the boundary line to Shreveport; it is leased from the Vicksburg, Shreveport & Pacific Railway Company. There is quite a number of lines leading out of Shreveport; I don't know as to whether the M., K. & T. has track connections at that point or not; I presume so. The G., H. & S. A. also connects with the Mexican International at Eagle Pass. I don't know personally about the track connections there, but I know that the Mexican International comes into Porfirio Diaz opposite Eagle Pass, and I presume there is a railroad bridge connecting the two towns. The G., H. & N., which is now owned by the G., H. & S. A., runs from Houston to Galveston by its own road and trackage rights. The New York, Texas & Mexican is now part and parcel of the G., H. & S. A., but, when it was the N. Y., T. & M., it extended from Rosenburg to Victoria, with two or three branches, one to Palacios and one to Hawkinsville; it doesn't run into Mata-
199 gorda; the Cane Belt runs there. The Gulf, West Texas and Pacific extends from Cuero to Port Lavaca, and Cuero to Beeville. The T. & N. O. also extends from Sabine Pass through Beaumont to Dallas. From the reports made by the G., H. & S. A. to the Railroad Commission, I would infer that a very large interstate commerce, consisting of fruits and ores, pass, from the Pacific slope, through interstate connections of the G., H. & S. A. at El Paso, over the G., H. & S. A. to Galveston and other Texas points, and for shipment beyond Galveston. The Commission doesn't receive its reports in sufficient detail to distinguish between foreign and interstate commerce on that traffic, but I would suppose that a large foreign commerce passed through Galveston over the G., H. & S. A., coming into Galveston by ship from foreign points and Atlantic seaboard points; some to the Pacific slope and some to points in Texas. From my general knowledge of the subject, I should say that a large interstate commerce from New York and other seaboard points, and also foreign countries, passes into the port at Galveston, and thence over the M., K. & T., the I. & G. N., the G., C. & S. F., the G., H. & N., and then onto the H. & T. C., H. E. & W. T. and

T. & N. O. to Texas points. It is a fact that a very large grain business moves down from the northwestward Territories, over the M., K. & T., I. & G. N., G., C. & S. F. and other roads, and flows out through the port of Galveston to foreign and seaboard points. The same is true as to cotton. Generally speaking, the conditions I have described as to the connections of these railroads and the movement of freight, existed in the year ending June 30,
200 1905; the general situation was the same during that year as now. The Texas Midland connects with the Paris & Great Northern at Paris, and with the Cotton Belt at Commerce, and runs into Greenville over its tracks. It also connects with the T. & P. at Paris and Terrell, and with the H. & T. C. at Ennis. I don't believe, as a matter of fact, the St. Louis & San Francisco of Texas and the St. Louis & San Francisco connect at State line. The Saint Louis & San Francisco of Texas crosses the Red River over the Katy bridge; there is a little gap between the two roads. The St. Louis and San Francisco runs out to Red River, though, and runs to St. Louis; I don't know whether it goes to Chicago or not. We have the reports of gross receipts of all these railroads in our department. The monthly reports call for it to show which is interstate and which is intrastate; and, as a general thing, they are furnished by the roads as called for. I don't know, as a matter of fact, that the St. Louis & San Francisco of Texas' report shows that 60 per cent. of its business is interstate.

I couldn't say from personal knowledge that the Colorado Southern connects with all the principal railway lines in the East, such as the Burlington, Rock Island, Missouri Pacific, and all those various lines. I think there is certain other roads run into Denver besides the Colorado Southern, but I don't know that I have ever seen one of them; the map shows what they are. The track connection of the I. & G. N., with the Mexican National at Laredo, is by virtue of a bridge crossing the Rio Grande River, and you go right through in the same car. I think there is a large international business of freight, passengers and express and mail done between Mexico
201 and the United States over the Mexican National and I. & G. N.

The St. Louis Southwestern Railway of Texas makes many connections with other railroads in Texas; my recollection is it has over sixty joint accounts; I mean at junction points, and at several of those junction points it joins with two or three or four other roads; it probably has more connections with other lines in the State than any other line. At Texarkana, it connects with the T. & P., Iron Mountain, and the Texarkana & Fort Smith also passes through the same place, but I don't know as to the track connections between the two. I think the Kansas City Southern runs through trains to Kansas City over the Texarkana & Fort Smith's tracks, but the latter is now supposed to be operated by the former; I don't know how it is as a matter of fact. The Iron Mountain and St. Louis Southwestern, at Texarkana, operate and handle traffic for St. Louis and Memphis. I know those lines and the Eastern lines operate into the same station at St. Louis, and there is a considerable

interchange of passenger business at that point. I was formerly auditor of what is now the St. Louis Southwestern of Texas; when it was operating under another name, and am reasonably familiar with the manner of the traffic at that time and since; it does a general interstate business, both on freight and passengers.

The T. & P. connects with the Iron Mountain, Texarkana & Fort Smith and St. Louis Southwestern at Texarkana, the Paris & Great Northern at Paris, and the Mexican Central and Southern Pacific at El Paso. It also has a direct line from El Paso through Texas to New Orleans on the Mississippi river, and I know
202 there is a considerable amount of cotton that is exported from New Orleans that passes over the T. & P. to that place; I would have to presume as to the imports. The T. & P., by virtue of its having a New Orleans outlet, should be in active competition with the Gulf lines entering Galveston on the export business, especially on cotton and cotton seed products. I don't know that I can state that such is the case; I know that those products pass out both ways. I am not a rate man, but I understand that the export rate on cotton and cotton seed products, and, you might say, on all heavy commodities from Texas common points intended for exports, is made up by a combination of the rail rate to the port, plus the water rates from the port to the point of export, and the lowest combination to any port would fix that rate. If the rate on cotton intended for export through Galveston was reduced, that would necessarily affect the rate on cotton intended for export through the New Orleans port.

About a year or so ago the Railroad Commission of Texas made an order requiring the railway companies of Texas to keep an account of the gross amount received for the use of their cars, in their earnings, and of the amount paid out for the use of other cars, as expenses. The latter part of that was ordered explicitly, and the other would follow; there was no direct order as to that, but it would follow. The Interstate Commerce Commission, in its form that it sends out, has it arranged so that the balance only would be shown; that is, if the receipts for car mileage were in excess of the payments for car mileage, that excess would go in the earnings. On the other hand, if the disbursements for car mileage should exceed the
203 receipts for car mileage, then that excess would go in their expenses. The Interstate Commerce Commission's report form is made up on that idea. A railroad company calls every road except itself a foreign road. Whenever the car of a foreign road is used on a line, they report the number of miles it runs, and formerly paid so much per mile; now it is paid so much per day; sort of a per diem basis instead of a mileage. If a railroad company has enough equipment of its own for its own line, it would have no expense to pay for the use of other cars, but, in order to keep from unloading at the ends of lines, and, in order to comply with our laws that require cars to be shipped through, they exchange cars with each other, but, instead of keeping it as an exchange account, they keep it upon a per diem basis. I am not familiar with the contracts by which the railroads of Texas carry the United States mails; I don't know that there is no separation of State and interstate mail. Each railroad reports

to the Railroad Commission of Texas at least annually, and some of them monthly, their receipts from the transportation of mail. In a general way, under the contracts that exist between the railroad companies and express companies for handling express on the passenger trains of the railroads, the express companies pay the railroad companies a certain per cent., ranging from 40 to 55 per cent. of the gross receipts. The express companies do the business, make the rates, with the approval of the Commission, collect the revenue, and report the gross amount of their business to the railroad companies, and, in some cases, these reports show the State and inter-
204 state business; but I wouldn't say that as to all. The railroad companies do not keep the waybills of the express companies, and I don't think have any way of checking up the express companies; simply take whatever the express companies give them.

The San Antonio & Aransas Pass runs from San Antonio to Corpus Christi, on Corpus Christi Bay, and to Rockport, and Aransas Bay. It connects with the Texas Mexican at Alice, which in turn connects with the Mexican International at Laredo. It connects with the St. Louis, Brownsville & Mexico at Sinton, which in turn connects with the road running to Point Isabel, and the St. Louis, Brownsville & Mexico crosses the Texas Mexican at Robbstown, and connects with it there. The S. A. & A. P. connects with the G., H. & S. A. at San Antonio, Cuero, Flatonio, Eagle Lake, Luling and Houston; also at Beeville, since the G., H. & S. A. acquired the G., W. T. & P. It connects with the H. & T. C. and G., H. & N. at Houston, and it connects with the M., K. & T. at Waco and West Point, I believe.

The T. & P. has its general offices in Texas, and its business in Texas is under the regulation of the Railroad Commission, and it makes its reports to that Commission. It probably has its financial headquarters in New York City, but its operating headquarters, accounting headquarters, are in Dallas. The reports I refer to, in regard to its gross receipts, are sent to the Commission from Dallas, and I have every reason to believe they are prepared there; the postmarks on the envelopes show that they are mailed from there; they have all the books and records there that would be necessary
205 in making those reports. The T. & P. makes a monthly report to the Railroad Commission of Texas, which covers their entire line, and then it makes an annual report, which includes its line in Texas only. In those monthly reports are embodied their gross receipts, as well as other matters which are material to be reported; that is, the monthly reports cover earnings and expenses only, and the annual reports cover a great variety of subjects.

The Houston & Texas Central Railroad and the Houston Direct Navigation Company both go into Houston. The T. & N. O. and G., H. & S. A., in a similar sense, connect with the Direct Navigation Company; but, in the case of the T. & N. O., the connection is even a little closer. The T. & N. O. has a track leading down to a place called Clinton, down on Buffalo Bayou, and there is a direct connection at that point. Clinton is below Houston, about nine miles. I was down there once; they have a warehouse down there, and a

large quantity of this round-bale cotton has been taken down there for transfer to the Direct Navigation Company. The word "Houston," I believe, does not any more belong in the title of the Direct Navigation Company. I know from a personal inspection of the records that the Direct Navigation Company is one of the connecting lines between the T. & N. O., the H. & T. C., the G., H. & S. A. and H. E. & W. T. for the movement of traffic on those roads. As to what I know about the Direct Navigation Company being a part of those roads in the way of transportation, can be said in a very few words. About two years ago the Railroad Commission of Texas called on each railroad to furnish a complete statement of all cotton transported over their respective railroads during the period of twelve months ending June 30, 1902; I think it was. They
206 did not call on the Direct Navigation Company, because it was a water line, and not under the jurisdiction of the Railroad Commission, as I understand it. Now, under that order, the G., H. & S. A., the T. & N. O., the G., H. & N., the N. Y., T. & M. and G., W. T. & P. would each have had to have made a separate report. Mr. C. B. Seger, who was at that time the auditor of the G., H. & S. A., T. & N. O. and G., H. & N. and while there was a different man that was auditor of the N. Y., T. & M. and G., W. T. & P., I know of my own knowledge that Mr. Seger exercised supervision over him; and Mr. Seger was very desirous of making a consolidated report. That was a little over two years ago; it was in the first of the calendar year of 1903—they were making the report for the accounting year ending June 30, 1902, of the movement of cotton in Texas. Mr. Seger made the proposition himself, that if we would allow him to make a consolidated report of those five roads, instead of a separate report for each of them, it would be a matter of economy, and he would also include in the report the cotton movement over the Houston Direct Navigation Company; that he also had charge of their accounts. And he made that consolidated report, and, in that way, the Commission got a report of the Houston Direct Navigation Company, which is the only report it has ever received, and it is on file in its office now, the report of the cotton movement over the Houston Direct Navigation Company for that year, incorporated in the same document with the cotton report of the five railroads named. And that about covers all the knowledge I have of the Direct Navigation Company. The Direct Navigation Company operates on Buffalo Bayou and Galveston Bay. Buffalo Bayou
207 is a navigable stream running from Houston to the Gulf; it has been so considered. I know of no prohibition by which any other concern could not operate vessels over and along there. I don't know for certain of any other boats that go up and down there carrying traffic; I don't think there are any, but there is no reason why they should not do so if they saw proper, except that part of Buffalo Bayou would be like the gentlemen stated the case on the railroad; I don't think that two boats could operate, navigate, at the same time; I expect that is true of near all canals. The Direct Navigation Company does not operate on the Trinity up at the head of navagation, at Dallas, that I know of.

ALLISON MAYFIELD, a witness on behalf of the State, testified as follows:

My name is Allison Mayfield. I am a Railroad Commissioner, and have been since January, 1897. I find here a copy of a letter I wrote to Mr. Stubbs, who is Traffic Director of the Southern Pacific Company, for a report of that company, and in reply to that request I received this document, which is the Eighteenth Annual Report of the Southern Pacific Company for 1902.

I know partially the physical situation at Houston, Texas, with regard to the connections between the H. & T. C., T. & N. O., H. E. & W. T. and G., H. & S. A. and the Houston Direct Navigation Company. I have been along the wharves of the Direct Navigation Company at Houston, and the T. & N. O., I think, is the only railroad that has its rails directly reaching those wharves, I mean the wharves of the Direct Navigation Company, and the industries located on that Bayou. My inspection went to the handling of only one
208 commodity, namely cotton, and I remember the S. P. or T. & N. O. rails reached Clinton. That is within the switching limits of th- city of Houston, outside of the corporate limits, and the rails of the T. & N. O. reach that point, and cotton was going into Houston, and some of it was moving out over the Direct Navigation Company, upon delivery being made to it at Clinton. Clinton has nothing but wharf facilities and a storage place for cotton and possibly cotton seed products, I don't remember about that, and in addition, I remember distinctly the Cleveland compress. Now, the rails of the T. & N. O., or some other of these kindred lines that I have named, reach that compress; the compress is located directly on the Bayou, and the cotton is delivered by the railroad to the compress, and the compress loads it onto the barges of the Direct Navigation Company from the compress. It is situated right on the Bayou and serves all the purposes of a wharf, and there are some other compresses, I don't recall them now. The Cleveland compress is right in the town of Houston, right close to town Clinton is lower down the Bayou towards Galveston, within the switching limits of the railroad company, about six or seven miles probably, and there is only one railroad reaches it. All the lines which I have just mentioned have physical connections, either one directly with the other, or through an intermediate kindred line; in fact, they are all one line under our order, so far as the handling of traffic is concerned; all these lines we treat as one line, and have done so for three or four years. We do not do that by the consent and approval of the officers of those lines, they resisted it. The lines I refer to are the G., H. & S. A., T. & N. O., H. & T. C., H. E. & W. T., and G. H. &
209 N. I do not recall all the circumstances that have produced the conclusion in my mind as to the ownership of the Direct Navigation Company, I have discussed the management of the Navigation Company, I think, with Mr. H. A. Jones, not that I was trying to find out anything especially officially, because we have nothing to do with it, but just in a general way. Then I have seen the reports of the Southern Pacific Company. I do not intend to say that the railroads in Texas, or either one of these corporations,

have any ownership of the Direct Navigation Company. I don't think I ever talked with Mr. Jones about the ownership of that company, it was some detail in the way of business moving over it. Mr. Jones is the general traffic manager of the T. & N. O., G., H. & S. A., G., H. & N. and also of the Atlantic system of the Southern Pacific Company. I have a pretty general recollection only of those roads requesting permission of the Railroad Commission to make consolidated reports required by the Commission as to cotton; I had forgotten it until my recollection was refreshed by what Mr. Askew said. I was just under the impression that Mr. Seger furnished evidence showing the movement of cotton over the Direct Navigation Company. I think this report was made at my instance, about the movement of cotton during a given period, and Mr. Askew did the work, and also the results show the amount moved over the Direct Navigation Company; that was all I was interested in. I have no recollection of Mr. Seger having requested permission to make his report as a consolidated report. The only thing I remember
210 about it is that the information as to the movement of cotton came from his office, that is all I remember of it.

I think I know a little something about the movement of passengers and freight over the railroads of Texas, but I don't know much about the transportation by water. Practically all of the freight and passenger business of Texas is done by rail; I am not sufficiently informed to approximate the percentage, but the overwhelming preponderance of it is done by rail transportation; I doubt if one per cent. is done over water routes. I don't know the extent of water transportation on the Trinity River, I have no knowledge of any. I have heard of some little fishing smacks and schooners running out of Galveston up into Chambers County some little piece, probably thirty or forty miles, some little business of that sort; that's all I know anything about. I don't know the distance from Dallas to the Gulf by the Trinity River. I think transportation by that river is prospective.

It is true the I. & G. N. has most extensive facilities and tracks running down to Harrisburg, for the express purpose of putting their cotton on Buffalo Bayou for transportation. If they could get the cotton, they would rather haul it over their own rails to Galveston, but probably the shippers want to handle it over those wharves, and they, of course, are competing for business. It is a fact that the McFaddens have very large facilities at Harrisburg, and the I. & G. N. tracks go right up to them. The I. & G. N. has fine terminals there, they are well located, there is no question about that, but I don't know that they are the finest they have there. The T. & N. O.
211 is well located at Clinton, but they are not so extensive as the I. & G. N. facilities at Harrisburg for delivering cotton to be transported over Buffalo Bayou to Galveston and shipside. I have never made the trip between Houston and Galveston by water, nor have I been down as far as Clinton by water, I went by rail. I know as a matter of public history, that Morgan steamers at one time ran on the Gulf of Mexico between Morgan City and Galveston, and also ran between Galveston and Clinton; I have seen the boats that are

said to have been used; they are tied up on the wharves at Galveston now, those old boats. They navigated the Gulf of Mexico and ran as far as Clinton, which is now within the switching limits of Houston. There is no question about the existence of water there that can accommodate the boats. The Direct Navigation Company have no monopoly over transportation on the Bayou. I think I have seen schooners in that Bayou at Houston, small sized vessels. There is no difference in the rates established by the Railroad Commission as between Houston and Clinton, they include Houston through. I don't know about any formal order of the Railroad Commission, but it is so treated by the railroad companies, and they can not refuse to make deliveries without first obtaining our consent or subjecting themselves to prosecution. It is the same rate to Harrisburg as to Clinton; they have the I. & G. N. terminals there. The Commission, under its rules and regulations, requires, for instance, the G., C. & S. F., when it hauls cotton to Houston, to deliver it on any tracks in the city of Houston on other railroads, and, as a matter of fact, the owner of the cotton, or any other
212 freight, can require any railroad company to carry it to Houston and deliver it on tracks that connect with the Navigation Company, and, if the case arose, the owner of cotton or other product, can require a railroad to carry it down to Harrisburg or Clinton, and deliver it there on the Bayou. I don't know as we have ever made any direct ruling to that effect, but I don't think there is any doubt about it. We have a general rule regulating the deliveries of freight in cities, coming in on one line, to points on other lines, and they are required to do that. It is a fact that the rates prescribed by the Railroad Commission of Texas are lower between Houston and Galveston than any other fifty mile haul in the interior of the State. We made those rates on account of water competition, on account of Buffalo Bayou, and the facilities for transportation by it. I think it is a fact that our rates between Houston and interior points are practically made to Houston, and the rate to and from Galveston is made by adding on this water competition rates between Houston and Galveston.

I am a member of the Railroad Commission of Texas. That Commission claims and exercises authority to fix the rates for the movement of traffic or freight between points in Texas on railroads. It does not claim any such authority in regard to water transportation. I do not remember how much cotton the Navigation Company reported as handling, in that report Mr. Askew testified about, but it was considerable, several hundred thousand bales; not only that year, but it handles considerable every year. The traffic on the Neches and Sabine Rivers, I suppose, refers mostly to lumber; it
213 isn't very considerable in comparison with the traffic that moves over the railroads of Texas, but there is some. When I said awhile ago that the water transportation was about one per cent. of the total transportation of the State, that was merely a guess; it might be considerably more than one per cent.

The State offers in evidence letter of date May 6, 1903, from Allison Mayfield, Commissioner, to J. C. Stubbs, traffic director of

the Southern Pacific Company, of Chicago, Illinois, requesting Mr. Stubbs to send him a copy of the annual report of the Southern Pacific Company, to its stockholders, for the year 1902.

The State offers in evidence the reply of J. C. Stubbs to the above request from Mr. Mayfield, under date May 9, 1903, stating that said request had been referred to Mr. Miller, the secretary of the company at New York.

The State offers in evidence letter of date May 11, 1903, from Mr. Miller, secretary of the Southern Pacific Company, to Mr. Mayfield, stating that he was sending to Mr. Mayfield by mail the requested copy of said report.

It was agreed in open court that the attorney for the defendant had actual knowledge on November 10, 1905, of the substance and effect of the judgment rendered by the district court of the Twenty-sixth Judicial District of Texas, in the case of the Paris & Great Northern Railway Company *versus* J. W. Stephens, *et al.*, the same being one of the injunction cases elsewhere mentioned in this statement of facts; and it was further agreed that that judgment in effect held that the Paris & Great Northern Railway Company was subject,
under the provisions of said chapter 141 of the Acts of the
214 Twenty-ninth Legislature of Texas, to a tax for the year 1905,
of only 169/365 of an amount equal to one per cent. calculated upon its gross receipts for the year ending on June 30, 1905, and the court granted its application for an injunction against the Comptroller of Public Accounts, the State Treasurer and the Attorney General of the State of Texas, restraining them from the collection from said company of any additional tax under said act for the year 1905; the Paris & Great Northern Railway Company having tendered to the State Treasurer, on October 17, 1905, 169/365 of an amount equal to one per cent. calculated upon its gross receipts for the year ending June 30, 1905.

It was further agreed that the Attorney General, after the rendition of the said judgment in the case of Paris & Great Northern Railway Company, announced to the attorney for the defendant, that the State would not abide by the judgment rendered by the court in said cause, but would take an appeal in that case, and that he had advised the State Treasurer to refuse to accept such tenders as might be made of that proportion of the taxes from other roads, and that upon such tender of such proportional part of said tax by the attorney for the Paris & Great Northern Railway Company, the State Treasurer did so refuse and stated that he would not accept a tender in payment of these taxes except for the full amount reported to him by the Comptroller.

It is further agreed that after the rendition of the decision of the court in the Paris & Great Northern case, Mr. Lassiter, as representative of the Rock Island, and Mr. Spoonts, as representative
215 of the Fort Worth & Denver City, went to the State Treasurer
and told him that they were here prepared to pay that proportion of the tax in behalf of those railroad companies, and Mr. Spoonts exhibited to the Treasurer a certified check for the amount of those taxes, and Mr. Lassister stated to the Treasurer that he had

arranged with a bank down town to get the money. Mr. Robbins, the State Treasurer, stated that he would not accept that amount, and if Mr. Lassister and Mr. Spoonts wanted to make a legal tender, he would require them to get the money, but that he would not accept the tender if made. That conversation with Mr. Robbins was had about 11 o'clock on the day of the first meeting of the attorneys for the railroads after the rendition of said judgment, towit, November 27, 1905, and at meeting of the attorneys during the noon hour the above conversation was reported to them by Mr. Spoonts. The Treasurer further stated to Mr. Spoonts and Mr. Lassiter that he had no records in his office, no method by which he could determine what taxes were due, except the statement rendered by the Comptroller, and he would have to be governed by that and that alone.

It was further agreed that the fact of the refusal of the State Treasurer to accept the tender made by the Paris & Great Northern, as above stated, was reported to the attorney for defendant in this case on the same day that such tender was made.

The State offers in evidence the following portions of the Eighteenth Annual Report of the Southern Pacific Company, identified by Commissioner Mayfield as the one received by him, as follows:

216 Title page as follows: "Eighteenth Annual Report of the Southern Pacific Company and its proprietary companies, for the year ended June 30, 1902."

The page showing the names and addresses of the directors and of the executive committee, and of the general officers, including the name of J. C. Stubbs, whose title is given as "Third Vice President and Traffic Director," and whose address is given as Chicago, Illinois.

Page 5 of said report, showing the properties and mileage of the Southern Pacific Company, as follows:

"The transportation lines constituting the Southern Pacific System, June 30, 1902, were as follows:

1. Mileage of lines belonging to companies whose capital stocks were principally owned by the Southern Pacific Company:

(*b*) Operated by companies owning the lines:

Morgan's Louisiana & Texas Railroad and Steamship Line: Main track, 323.770; second track, 35.870; sidings 159.86; ferries, 1.00; river and ocean lines, 1,375.

Texas & New Orleans Railroad; Main track, 395.330; second track, 3.890; sidings 117.82.

Galveston, Harrisburg & San Antonio Railway; Main track, 917.000; sidings, 189.10.

Galveston, Houston & Northern Railway; Main track, 53.440; side track, 13.42.

Houston East & West Railway: Main track, 190.690; sidings, 29.87.

New York, Texas & Mexican Railway: Main track, 122.410; sidings, 13.25.

Houston & Texas Central Railroad: Main track, 668.730;
217 sidings, 160.43.

II. Mileage of lines belonging to companies whose capital

stocks were principally owned by the Morgan's Louisiana & Texas Railroad and Steamship Co., but which were operated by companies owning the lines:

Direct Navigation Company: River and ocean lines, 75.

Gulf, West Texas & Pacific Railway: Main track, 111.200; sidings, 16.53."

Page 6, as follows: "The following changes have also occurred in the corporations owning the lines operated:

Houston & Texas Central Railroad. Under an Act of the Legislature of the State of Texas, approved March 28, 1901, the Houston & Texas Central Railroad Company was authorized to purchase, own and operate the railroads of the Central Texas and Northwestern Railway Company, the Fort Worth & New Orleans Railway Company, the Austin & Northwestern Railroad Company, and the Lancaster Tap Railroad. With the exception of the Lancaster Tap Railroad, these railroads were acquired by the Houston & Texas Central Railroad Company on August 22, 1901. The mileage of the railroads thus acquired aggregated 162.40 miles of main track and 25.20 miles of sidings.

Texas & New Orleans Railroad. On April 20, 1902, the Dallas Division was completed from Frankfort to Jacksonville, a distance of 15.87 miles; and on December 10, 1901, an extension was built from Bonito Junction, on the Sabine Division, to Mahl, a distance of 5.51, making total additions during the year of 21.38 miles."

Page 50, as follows: "Rolling stock and floating equipment owned—Proprietary companies and Southern Pacific Company:

218 Direct Navigation Company: Tugs, Louis, 105 tons; Mina, 56 tons; Sterrett, 29 tons; 9 barges, 2277 tons; 1 derrick boat; 1 pile driver; 1 pile-driver barge."

It is understood and agreed that wherever the word "defendant" occurs in this statement of facts, it is applicable to each, either or all of the defendants in this case.

Case closed.

219 We hereby agree that the above and foregoing statement of facts is a full, true, correct and complete statement of all the material facts adduced in evidence on the trial of said cause, by the respective parties.

R. V. DAVIDSON,
Attorney General,
W. E. HAWKINS,
Assistant Att'y Gen'l,
Attorney- for the State.
BAKER, BOTTS, PARKER & GARWOOD,
Attorneys for Defendants, The Galveston, Harrisburg & San Antonio Ry. Co., The New York, Texas and Mexican Ry. Co., The Gulf, Western Texas and Pacific Ry. Co., and The Galveston, Houston & Northern Ry. Co.

The above and foregoing statement of facts, found correct, signed and approved by me, this 3rd. day of January, A. D. 1906.

V. L. BROOKS,
Judge of the Twenty-sixth Judicial District of Texas.

(Endorsed:) Filed January 3rd. 1906. Jas. P. Hart, Clerk.

220 *Defendant's Assignments of Error.*

Filed January 9, 1906.

In the District Court of Travis County, Texas.

No. 23358.

THE STATE OF TEXAS
vs.
THE GALVESTON, HARRISBURG & SAN ANTONIO RY. CO., THE NEW YORK, TEXAS & MEXICAN RAILWAY CO., GULF, WESTERN TEXAS & PACIFIC RAILWAY CO., GALVESTON, HOUSTON & NORTHERN RAILWAY COMPANY.

Now comes the defendant in the above styled and numbered cause, pending in the District Court of Travis County, Texas, and presents and files the following assignments of error to the action of the said District Court of Travis County, upon the trial of said cause, to-wit:—

First Assignment of Error.

The Court erred in overruling the defendant's general demurrer to the plaintiff's petition.

Second Assignment of Error.

The Court erred in overruling sub-division 2 of defendant's special exception III to plaintiff's petition, which was as follows:

"Said Act of the Legislature in said petition referred to is unconstitutional and void, for that the same is in conflict with, and in contravention to the third paragraph of Section 8, Article I,
221 of the Constitution of the United States which provides 'that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian Tribes,' in this, that said Act seeks to levy, and does levy, a tax directly upon defendant's receipts from interstate and foreign commerce, and regulates, obstructs and hinders commerce between the several states and with foreign nations."

Third Assignment of Error.

The Court erred in overruling sub-division 3 of defendant's special exception III to plaintiff's petition, which was as follows:—

"That said Act is violative of and in contravention of the four-

teenth amendment to the Constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, in this, that said Act provides that the taxes herein levied shall be in addition to all other taxes levied by law, and the court being judicially informed that the property of this defendant has been and is now assessed for taxation upon an ad valorem basis and rate as all other citizens of the State of Texas, to now levy upon it an additional tax of one per cent. upon its gross receipts, when a like tax is not levied on other citizens of the State of Texas, is an unequal, unjust and arbitrary discrimination in taxation against this defendant, contrary to said Section 1, Article 14 of the amendment- to the Constitution of the United States.

222 Fourth Assignment of Error.

The Court erred in overruling sub-division 4 of defendant's special exception III to plaintiff's petition, which was as follows:—

"Said Act of the Legislature is contrary to and in violation of Section 1, Article VIII of the Constitution of the State of Texas, which provides that taxation shall be equal and uniform, and all property in this State, whether owned by natural persons or corporations other than municipal, shall be taxed in proportion to its value, which shall be ascertained as provided by law."

Fifth Assignment of Error.

The Court erred in overruling sub-division 5 of defendant's special exception III of plaintiff's petition, which was as follows:—

"That said Act is in violation of that provision of Section 1, Article VIII of the Constitution of Texas, which authorizes the Legislature to tax incomes of both natural persons and corporations other than municipal, because said Act does not levy, or purport to levy, and the other statutes of the State of Texas do not levy or purport to levy, an equal and uniform tax on the incomes of both natural persons and corporations other than municipal, or upon the gross receipts of both natural persons and corporations other than municipal."

Sixth Assignment of Error.

The Court erred in overruling sub-division 6 of defendant's special exception III to plaintiff's petition, which was as follows:

223 "Said Act is in contravention of Section XI, Article VIII of the Constitution of the State of Texas, which provides that all property,whether owned by persons or corporations, shall be assessed for taxation, and the tax paid in the County where situated."

Seventh Assignment of Error.

The Court erred in overruling sub-division 7 of defendant's special exception III to plaintiff's petition, which was as follows:—

"Said Act is in contravention of Section 1 of the 14th Amendment

to the Constitution of the United States, providing that no state shall deny to any person within its jurisdiction the equal protection of the law, in this, that this defendant and other railroad companies are selected from among the masses of persons and property in the State, and certain taxes are imposed upon it, which are not imposed upon other persons and property in the State, and the reports of certain persons, officers and agents required by said Act are given the effect of an absolute assessment of said property for taxation, whereas, under the laws of said State of Texas, no tax of the same or similar nature is imposed upon other persons and corporations and the property of all other persons and corporations is assessed in proportion to its value and not at an absolute, fixed and mathematical sum, to be arbitrarily determined by a single officer, to-wit, the Comptroller of the State of Texas."

Eighth Assignment of Error.

The Court erred in overruling sub-division 8 of defendant's special exception III to plaintiff's petition, which was as follows:—

224 "That said Act is contrary to the provisions of Section 8 of Article VIII of the Constitution of the State of Texas which provides that all property of railroad companies shall be assessed and the tax collected in the several counties in which said property is situated, including so much of the road bed and fixtures as shall be in each county, and that the rolling stock may be assessed in gross where the principal office of the company is located."

Ninth Assignment of Error.

The Court erred in overruling sub-division 9 of defendant's special exception III to plaintiff's petition, which was as follows:—

"That said Act is contrary to Sections 11, 14, 15, 16 and 18 of Article VIII of the Constitution of the State of Texas, in this, that it provides that the Comptroller shall levy and assess a tax of one per cent. on defendant's gross receipts, whereas, it is provided in said section II of Article VIII, that all property shall be assessed for taxation and the tax paid in the County where situated, and in section 14 that there shall be elected by the qualified electors of the County an Assessor, who, as provided in Section 15 shall assess said property for taxation, and Section 18 thereof providing that the Commissioners' Court of each County shall constitute a Board of Equalization for the purpose of equalizing, as near as may be, the value of all property rendered for taxation, said bill depriving the County Assessors and Boards of Equalization of their constitutional right to assess and equalize defendant's property, and conferring the same upon the Comptroller of the State, and depriving defendant

225 of its constitutional right to have said property assessed and equalized by said County Assessor and Board of Equalization in the several counties where situated. That said Act is contrary to Section I, Article VIII of the Constitution of the State of Texas, in that it imposes a double taxation upon defendant, in this that defendant, under and by virtue of the provision of Act

of March 1st, 1905, for which see Chapter 19 of the General Laws of the Twenty-ninth Legislature, page 21, is compelled to pay, and has paid, a tax upon its franchises, as measured by the amount of its capital stock."

Tenth Assignment of Error.

The Court erred in overruling sub-division 10 of defendant's special exception III to plaintiff's petition, which was as follows:—

"That said Act is contrary to Section I, Article VIII of the Constitution of the State of Texas, in that it provides for and compels double, unequal and un-uniform taxation by imposing a tax of one per cent. upon defendant's gross passenger revenue, earned within the State, for the year ending June 30th. 1905, when under and by virtue of the laws in force at the time of the passage of said Act, it has already paid taxes to the extent of one per cent. thereon."

Eleventh Assignment of Error.

The Court erred in overruling sub-division 19 of defendant's special exception III to plaintiff's petition, which was as follows:—

"Said Act of the Legislature is contrary to and violative of Section 9 of Article VIII of the Constitution of the State of Texas,
226 which provides that the State tax on property, exclusive of the tax necessary to pay the public debt, and all taxes providing for the benefit of free schools shall never exceed thirty five cents on the one hundred dollars' valuation."

Twelfth Assignment of Error.

The Court erred in overruling sub-division 20 of defendant's special exception III to plaintiff's petition, which was as follows:—

"Said Act is violative of Section 16, Article I, of the Constitution of the State of Texas, which provides that no *Ex Post Facto* Law, retroactive law, or law impairing the obligation of contracts shall be made."

Thirteenth Assignment of Error.

The Court erred in overruling sub-division 21 of defendant's special exception III to plaintiff's petition, which was as follows:—

"That said Act of the Legislature is contrary to and in violation of Article VIII, Section I, of the Constitution of the State of Texas, in this, that if said Act is intended for, and is a tax upon the gross receipts of defendant corporation, and is an income tax, that the income tax contemplated by Section I, Article VIII, was not upon that income arising from the use of property already taxed, and that to tax the income from property already taxed, is double, unequal and ununiform contrary to Section I, Article VIII of said Constitution, and that in addition thereto, such income tax, if imposed, must be imposed upon all persons or corporations other than municipal persons and corporations in the State of Texas, or the same
227 is not equal and uniform taxation, as provided in said Section and Article of the Constitution of this State."

Fourteenth Assignment of Error.

The Court erred in overruling sub-division 22 of defendant's special exception III to plaintiff's petition, which was as follows:—

"Said tax imposed in said Act is violative of Section I, Article 14 of the amendments to the Constitution of the United States, in this, that it deprives defendant of the equal protection of the law, no like income tax being imposed upon other persons and corporations in said State."

Fifteenth Assignment of Error.

The Court erred in overruling sub-division 23 of defendant's special exception III to plaintiff's petition, which was as follows:—

"That said tax imposed by said Act of the Legislature denies defendant the equal protection of the law contrary to said Section 1, Article 14, of the amendment to the Constitution of the United States, in this, that thereby a tax of one per cent. on its gross income is imposed, while no like tax is imposed upon other persons and corporations in said State; and by Section 19 of Article VIII of the Constitution of Texas, incomes from lands used for farming purposes are exempted."

Sixteenth Assignment of Error.

The Court erred in overruling sub-division 24 of defendant's special exception III to plaintiff's petition, which was as follows:—

228 "That said Act is violative of Section 10, Article I of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, in this, that it appears upon the face of plaintiff's petition that defendant is a corporation chartered under the laws of the State of Texas, as a common carrier of freight and passengers, with the power to do and perform all and singular the acts and things usually incident to the transaction of the business of a corporation; that said charter constitutes and is a contract between the State of Texas and defendant, under which the State of Texas extended to it the privilege and franchise conferred in said charter, and that the imposition of an unequal, unusual and confiscatory burden of taxation imposed by said bill is such as was not contemplated in such contract, and operates to impair the obligation thereof."

Seventeenth Assignment of Error.

The Court erred in overruling sub-division 25 of defendant's special exception III to plaintiff's petition, which was as follows:—

"That said Act, if considered as an occupation tax, is contrary to and violative of the provisions of Section 2, Article VIII of the Constitution of Texas, which provides that all occupation taxes shall be equal and uniform upon the same class of subjects within the limit of the authority levying the tax."

Eighteenth Assignment of Error.

The Court erred in overruling sub-division 28 of defendant's special exception III to plaintiff's petition, which was as follows:—

229 "That it appears upon the face of said Act, and of plaintiff's petition, that same is violative of Section I of Article 14 of the amendments to the Constitution of the United States, in this, that it imposes upon this defendant and other railway corporations similarly situated, a burden of taxation which is unequal, unreasonable and discriminatory, and such as is not imposed upon other persons, citizens or tax payers of the State of Texas, and therefore deprives defendant of the equal protection of the law."

Nineteenth Assignment of Error.

The Court erred in overruling sub-division 29 of defendant's special exception III to plaintiff's petition, which was as follows:—

"Under the Constitution and laws of the State of Texas and of the laws of the United States, defendant is authorized, empowered and required to connect with railroads of other states, and is engaged in the transportation of interstate and foreign commerce, and as such is an instrumentality of interstate commerce, and the Act alleged, if considered as an occupation or privilege tax, levies on defendant a tax far in excess of and in addition to the regular ad valorem tax imposed under the general laws of the State of Texas, and is a regulation, hinderance and obstruction to interstate commerce, contrary to the third paragraph of Section 8, Article I of the Constitution of the United States, which provides that 'Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian Tribes."

230 Twentieth Assignment of Error.

The Court erred in rendering any judgment whatsoever against the defendant for any portion of the taxes sought to be imposed by said Gross Receipts Tax Bill, for the year 1905.

Twenty-first Assignment of Error.

The Court erred in not rendering judgment for the defendant upon the trial of said cause.

Twenty-second Assignment of Error.

The Court erred in rendering judgment for the plaintiff for any amount, for it appeared from the uncontroverted evidence that a large part of the receipts of the defendant for the year ending June 30th, 1905, upon which the tax awarded the plaintiff by the judgment was based, were receipts derived by the defendant from the transportation of freight, passengers, baggage, mail and express between points in different states and territories of the United States and between points in the United States and foreign countries, such

receipts this (thus) being derived from commerce among the states and foreign countries, and such transportation being commerce between the states and foreign countries, and the court having held that the Act of the Legislature, applies to such interstate and international receipts, and as applied to the same the said Act being in contravention of the clause of the Constitution of the United States conferring upon Congress the authority to regulate commerce among the state- and with foreign countries, the court should have held that the Act was void, there being no provision in the Act for the assessment or collection of the tax on receipts only from transporta-
231 tion and other sources within the State.

Twenty-third Assignment of Error.

It appears from the uncontroverted evidence that a large part of the receipts of the defendant were derived from interstate and international transportation, and the Act of the Legislature as construed by the Court applies to and levies a tax upon such receipts in a sum equal to one per cent. thereof, which is, in effect, a regulation of interstate and foreign commerce contrary to the clause of the Constitution of the United States conferring power to regulate such commerce upon Congress, therefore the court erred in including in its judgment a sum equal to 169/365 of one per cent. of such receipts so derived from international and interstate commerce.

Twenty-fourth Assignment of Error.

It appearing from the evidence that some of the items of the receipts of the defendant for the year ending June 30th, 1905, from transportation could not be divided between State and interstate and international commerce, the court erred in including in its judgment in favor of the plaintiff a sum equal to 169/365 of one per cent. of such receipts.

Twenty-fifth Assignment of Error.

The court erred in rendering judgment for the plaintiff, because it appeared from the undisputed evidence that the defendant has always paid, and will pay for the present year, the taxes assessed against all of its property at the same rate required of other property, which property has been rendered and assessed and its tax value ascertained and equalized by the tax assessors and boards of equalization
232 of the State in the same manner as such other property situated within the State, and in accordance with the Constitution and laws of the State; and therefore defendant cannot be subjected to an additional tax in any form to which other property is not subjected, or which other property owners are not subjected, since defendant being engaged in interstate and foreign commerce and having been so engaged during the year ending June 30th, 1905, and since same would be a burden upon interstate and foreign commerce contrary to the Constitution and laws of the United States.

less than eighty-one hundred, each for six hundred and forty acres, to the T. & P. The earliest of them, I think, were issued in 1873. I couldn't say I could positively identify the issuance by date. I couldn't say positively as to how many of those certificates issued to the T. & P. after the first of June, 1873, were barred; to the best of my recollection, there were a hundred or more of them that died, that were barred by limitation; a great many of them were lost by locating them on fractions and one thing or other. We got patents for very much less than that, we did not get patents for all the land for which we held certificates. There is a great deal of land that has not been patented yet that can be patented, that will be patented upon request; other certificates that were located, there is some objection to under the survey not closing. To the best of my recollection and belief, the T. & P. has actually received from the State of Texas as a bonus for building its line of railroad, since the first day of June, 1873, a very little less than eight thousand certificates of six hundred and forty acres each.

187 Defendant offers in evidence the last official map of the Railroad Commission of Texas, which is hereto attached, and marked for identification "Exhibit A," and it was admitted that the connections of the various lines of railroad delineated thereon, including that of defendant, are correctly shown on said map.

(Here follows map marked p. 187*a*.)

It was shown by the evidence that the following statement of the gross receipts and the divisions thereof, of the companies named, for the year ending June 30, 1905, is correct:

Texas & New Orleans Railroad Company.

Receipts from interstate traffic	$1,532,112.64
Receipts from intrastate traffic	1,632,705.65
Unapportioned:	
Mail	56,912.90
Express	58,417.22
Extra Baggage	9,040.32
Switching	46,347.77
Car service	249,430.20
Locomotive mileage	26,920.70
Total	$3,611,887.40

Texas & Pacific Railway Company.

Receipts from interstate and foreign traffic	$5,454,375.53
Receipts from Louisiana and Arkansas traffic	2,376,893.71
Receipts from intrastate traffic	3,838,826.69
Unapportioned:	
Mail	276,602.99
Express	288,210.38
Louisiana and Arkansas miscellaneous	53,582.98
188 Miscellaneous	353,848.36
Total	$12,642,340.64

San Antonio & Aransas Pass Railway Company.

Receipts from intrastate traffic	$1,446,620.27
Receipts from interstate traffic	1,061,966.74
Total	$2,690,183.86

Galveston, Harrisburg & San Antonio Railway Company.

Receipts from interstate traffic	$5,209,389.79
Receipts from intrastate traffic	1,578,744.11
Unapportioned:	
Mail	129,160.22
Express	78,752.93
Extra Baggage	18,068.56
Switching	57,673.09
Car Service	293,792.73
Locomotive mileage	106,877.04
Total	$7,472,458.47

Twenty-sixth Assignment of Error.

The Court erred in rendering judgment for the plaintiff, because, where, as it here appears, a railway company chartered as such, the property of which can be devoted to no other use and which is compelled, under the law, to dedicate its property to that use and to no other, has had that property, which includes its franchi*es*, fairly assessed and valued for taxation in the same proportion to actual value as the property of other citizens of the State, and is now paying the same ad valorem tax on such property as other citizens of the State, and, in addition thereto, has paid a specific franchise tax, to impose upon such company under the guise of an occupation tax or otherwise, a burden of taxation more than double that imposed under the regular ad valorem tax levied on the property of all other citizens by general law and out of all due proportion to all other occupation taxes, is to deprive it of its property without due process of law, and to deny it the equal protection of the law, contrary to section I of the 14th. Amendment to the Constitution of the United States.

233 Twenty-seventh Assignment of Error.

The Court erred in render*ed* judgment for the plaintiff, because the tax imposed, if considered as an occupation tax, deprives defendant of its property without due process of law, contrary to the provisions of the 14th amendment to the Constitution of the United States, in this, that it exacts an occupation tax for the right to use property constructed for a particular use, and without value for any other use, and compelled by the State to be used for that particular purpose, and no other,—the right to use such property inhering in the property itself, and the State being without power to exact license or occupation tax therefor.

Twenty-eighth Assignment of Error.

The Court erred in rendering judgment for the plaintiff, after holding the tax in question to be an occupation tax, because it appeared from the uncontradicted evidence that during the year ending June 30, 1905, and before and since that time, that a large part of the commerce of the State of Texas was conducted by common carriers by water in competition with defendant and other common carriers by rail, and that such competition by common carrier by water was and is real and substantial and to a very large extent affected the rates that were charges and could be charged by defendant and other common carriers by rail; and as the Act of the Legislature in question does not impose, and as no other Act of the State of Texas imposes a similar tax on such common carriers by water, therefore, the said Act of the Legislature, attempting to impose the tax in question upon defendant and other rail car-
234 riers was and is repugnant to the constitution of the State of Texas, Section II, Article VIII wherein it is provided that occupation taxes shall be equal and uniform upon the same class of subjects.

Twenty-ninth Assignment of Error.

The Court erred in rendering judgment for plaintiff, because it appeared from the evidence that The Texas & Pacific Railway Company which operated during the year ending June 30th, 1905, and before and since, a very large number of miles of railroad in the State of Texas, and during all such time was engaged in the carriage of interstate and internations and State freight, passengers, baggage, mail and express in active competition with defendant, and since the said The Texas & Pacific Railway Company is charter- by the Government of the United States and is a federal corporation, it cannot be subjected by the State of Texas to the tax sought to be imposed on this defendant or its property by the Act of the Legislature in question; therefore such Act of the Legislature is contrary to Section II, Article VIII of the Constitution of the State of Texas, wherein it is provided that occupation taxes shall be equal and uniform upon the same class of subjects.

Thirtieth Assignment of Error.

The Court erred in rendering judgment for the plaintiff because it appeared from the evidence, that, prior to June 30th, 1904, defendant was duly chartered and incorporated under the laws of the State of Texas without reservation of the authority on the part of the State or the Legislature of said State to alter, amend, or repeal the charter of the defendant; and it appeared that the defendant has heretofore paid and will pay the taxes as specified in the foregoing 25th and 26th assignments, therefore, to impose the additional exhor-
235 bitant and excessive tax sought to be imposed by the Act now in question, would impair the obligation of defendant's charter contract, contrary to the Constitution of the United States and of the State of Texas, each of which prohibits the Legislature of the State of Texas, or any authority purporting to act thereunder, from passing any law or doing any act the effect of which would be to impair the obligation of a contract, and would deprive the defendant of property without due process of law, contrary to the 14th amendment to the Constitution of the United States, and of the Bill of Rights of the Constitution of the State of Texas.

Thirty-first Assignment of Error.

The court erred in rendering judgment for the plaintiff, because the Act of the Legislature here in question is violative of the Constitution of the State of Texas, by reason of the fact that it provides that when any railway company shall pay the tax under what is commonly known as the Intangible Assets Bill, same being Chapter 146 of the General Laws of the State of Texas of the regular session of 1905, then that such railway company shall be released from the payment of the tax imposed by the act here involved, which is a discrimination in favor of the other railway company which pays its tax under the said Intangible Assets Bill and is violative of that provision of the Constitution of the State of Texas, which requires all

occupation taxes to be equal and uniform upon the same class of subjects within the limit of the authority levying the tax.

Thirty-second Assignment of Error.

The Court erred in its conclusions of law, and in rendering judgment for the plaintiff, after holding the tax in question to be
236 an occupation tax, because it appears from the Act of the Legislature here involved that the attempt is thereby made to levy an occupation tax on the defendant for the entire year 1905, when said Act did not take effect until about July 16th, 1905, which is contrary to the Constitution of Texas which prohibits the Legislature from passing any retroactive law; and because such act of the Legislature is further retroactive in that it attempts to levy a tax based on the gross receipts for the year ending June 30th, 1905, when such year had expired before the act took effect; and because further, no provision was made in said Act for apportioning the occupation tax attempted to be levied for the year 1905 between that part of the year before and after the date when the Act took effect.

Thirty-third Assignment of Error.

The Court erred in rendering judgment for the plaintiff, because, if the tax levied by the Act in question be considered as an occupation tax, it is imposed upon the occupation of engaging and carrying on interstate and foreign commerce, as well as the occupation of engaging in and carrying on State commerce, and in imposing an occupation tax for engaging in and carrying on interstate commerce, it is in violation of sub-division 3 of Section 8 of Article 1 of the Constitution of the United States, giving Congress the power to regulate commerce with foreign nations and among the several states.

Thirty-fourth Assignment of Error.

The Court erred in rendering judgment for the plaintiff, because if regarded as imposing an occupation tax upon both the business of engaging in and carrying on interstate and foreign commerce and the business of engaging in and carrying on state commerce
237 the act in question, by reason of the indivisibility of the two kinds of business and the inseparability of the one business from the other, is void as a whole.

Thirty-fifth Assignment of Error.

The Court erred in rendering judgment for the plaintiff, because, if the Act in question be considered as imposing an occupation tax solely upon the occupation of engaging in and carrying on state commerce, it is nevertheless in violation of sub-division 2 of Section 8 of Article I of the Constitution of the United States conferring upon Congress the power to regulate commerce with foreign nations and among the several states, since, in arriving at the amount of the tax, the receipts derived from interstate and foreign transportation, as well as those derived from state transportation, must be taken as a

basis, thereby causing the tax to directly relate to and affect interstate and foreign commerce, and since the imposition of a tax equal to one per cent. of the gross receipts derived from interstate and foreign transportation is an impediment and obstruction to and a burden upon interstate and foreign commerce.

Thirty-sixth Assignment of Error.

The court erred in rendering judgment for the plaintiff, because, if the Act in question be considered as levying a tax solely upon the occupation to do business within the State, it is nevertheless in violation of sub-division 3 of Section 8 of Article 1 of the Constitution of the United States, conferring upon Congress the power to regulate commerce with foreign nations and among the several states, in that the burden of the same will necessarily fall on the interstate occupation, since defendant cannot renounce its State occupation
238 and pursue only its occupation as carrier of interstate and foreign commerce.

Thirty-seventh Assignment of Error.

The Court erred in rendering judgment for the plaintiff, because, if the tax in question be considered as levying a franchise tax, it is in violation of Section 1 of Article 8 of the Constitution of the State of Texas, requiring that taxation shall be equal and uniform and that all property in the State shall be taxed in proportion to its value, since defendant is already taxed upon its franchises both of corporate existence and corporate powers, and to sustain the tax under the Act in question as a franchise tax would produce double taxation.

Thirty-eighth Assignment of Error.

The Court erred in rendering judgment for the plaintiff, because, if the Act in question be considered as imposing a franchise tax, it is a violation of Section 1 of Article 8 of the Constitution of Texas, requiring that taxation shall be equal and uniform and that all property in the State shall be taxed in proportion to its value, since neither the same tax nor any similar tax is imposed by any law of the State of Texas upon other common carriers which are corporations engaged in the transportation of passengers, freight and baggage in competition with defendant and other railroad companies in this State, and since natural persons having no franchise and engaging in the transportation of passengers, freight and baggage in competition with defendant and other railroad companies in this State are not and cannot be by law subjected to a franchise tax.

239 Thirty-ninth Assignment of Error.

The Court erred in rendering judgment for the plaintiff, because the tax levied by the Act in question is in fact a tax upon the income of railroad corporations, and as such it violates Section 1 of Article 8 of the Constitution of the State of Texas, requiring that taxes shall

be equal and uniform and that all property in the State shall be taxed in proportion to its value.

Fortieth Assignment of Error.

The Court erred in rendering judgment for the plaintiff because the tax attempted to be levied by the Act in question is in fact a tax upon the income of railroad corporations, derived from interstate and international commerce, and as such is a regulation of such commerce in violation of the third paragraph of Section 8, Art. 1, of the Constitution of the United States.

Forty-first Assignment of Error.

If the tax in controversy is to be considered as an occupation tax, then the trial court erred in its conclusions of law and in rendering judgment in favor of the State for 169/365 of one per cent. of the gross receipts of defendant from every source whatsoever, because the evidence showed that defendant had paid occupation taxes by paying one per cent. on its e-rnings from the carriage of passengers between points within the State for the first one half of the year 1905, being two-quarters thereof; and because the Act of the 29th Legislature is controversy purports to levy a tax for the entire year 1905, and does not provide any method of apportioning the same,—for which reasons said Act cannot be enforced for any portion of the year 1905 by the Courts.

240 Forty-second Assignment of Error.

The Court erred in rendering judgment for any sum in behalf of the State, after holding that said Act imposed an occupation tax for pursuing the business of the carriage of passengers, freight, baggage, mail and express within the State of Texas, because under the terms thereof the various railroads subject thereto would be required to pay a tax based upon their earnings from both intra-state and interstate, and international commerce, and the evidence in the case shows that their earnings derived from intra-state business as compared with the total amount of their gross receipts from interstate and international business varies so greatly, that the effect would be to require different railroad companies to pay different percentages on their gross receipts from state business, which is in violation of Section 2, Article 8 of the Constitution of the State of Texas, and in violation of that part of Section 1 of the 14th. amendment to the Constitution of the United States, which provides that no state shall deprive any person within its jurisdiction of the equal protection of the law.

Forty-third Assignment of Error.

The Court erred in holding the Act of the 29th. legislature in controversy to be constitutional and in rendering judgment in behalf of the State, because the evidence shows that the defendant has no assets or property that has not heretofore been subject to taxation, and shows that it has paid its taxes thereon in the same proportion as

other property and tax payers of the State have been required to pay, and the imposition of the tax provided for in said Act is
241 therefore an unjust and an arbitrary burden laid upon the defendant, in violation of Sections 1 and 2 of Article 8 of the Constitution of the State of Texas; and of that portion of Section 1 of the 14th. amendment to the Constitution of the United States, which provides that no State shall deprive any person within its jurisdiction of the equal protection of the law, and that portion thereof which provides that no persons shall be deprived of his property without due process of law.

Forty-fourth Assignment of Error.

The Court erred in rendering judgment for the plaintiff, because the Act in controversy is contrary to and in violation of Section 35, Article 3 of the Constitution of the State of Texas, which provides that the subject of every bill shall be expressed in its title, in this, that the caption of the said Act does not include or express in its provisions the subject of taxing a railroad having a line of railway both within and without the State of Texas, and as the body of the said Act contains a provision for taxing a railway company having a line of railway within and without the State of Texas, it includes a subject which is not expressed or referred to in the title thereof, and is therefore unconstitutional and void; and if it be held under this assignment of error that the Act is unconstitutional as to railway companies having lines partly within and partly without the State of Texas, then it must be held as unconstitutional and void as to this defendant, because same would be in violation of Section 2 of Article 8 of the Constitution of the State of Texas, requiring that all occupation taxes shall be equal and uniform on the same class of subjects.

242 Forty-fifth Assignment of Error.

The Court erred in rendering judgment against this defendant for any sum whatsoever, because the act of the Legislature in controversy, and Chapter 146 of the Acts of the session of the 29th. legislature, commonly known as the Intangible Asset Bill when considered together, place it within the power of any corporation, person or association of persons subject to the acts in controversy, by rendering their property for taxation and paying the taxes thereon under the said Intangible Asset Bill, to thereby suspend the operation of the act in controversy, which would be in violation of Section 28 of the Bill of Rights of the State of Texas, which provides that no power of suspending laws in the State of Texas shall be exercised except by the Legislature.

Forty-sixth Assignment of Error.

The Court erred in rendering judgment against this defendant for any amount whatsoever, because the Act in controversy provides that the corporations and persons therein named shall be subject to a tax on their gross receipts, and it then provides that such persons or cor-

porations as shall render and pay taxes on their property in compliance with the Intangible Asset Bill shall be relieved of the gross receipts tax imposed by the Act in controversy, thereby producing confusion and inequality in the tax imposed under the laws of the State, in violation of the provisions of Section 1, Article 8 of the Constitution of Texas, which provides that taxation shall be equal and uniform.

243 Forty-seventh Assignment of Error.

The Court erred in rendering judgment for the plaintiff because the Act in controversy is so indefinite and uncertain that it cannot be determined therefrom the amount of taxes that shall be paid by those subject thereto, or the time for which said taxes shall be paid.

Forty-eighth Assignment of Error.

The Court erred in its first conclusion of law, in holding that the statute referred to is not obnoxious to any provision of the Constitution of the United States, or of the Constitution of the State of Texas, and is a valid law except in certain particulars relating to penalties and to the payment of taxes calculated on gross receipts derived from car and track rentals.

Forty-ninth Assignment of Error.

The Court erred in its first conclusion of law in holding that the statute referred to, except in the particulars therein stated, is not obnoxious to any provision of the Constitution of the United States.

Fiftieth Assignment of Error.

The Court erred in its first conclusion of law in holding that the statute referred to, except as therein stated, is not obnoxious to any provision of the Constitution of the State of Texas.

Fifty-first Assignment of Error.

The Court erred in its second conclusion of law in holding that the statute in controversy imposed an occupation tax on the defendant.

BAKER, BOTTS, PARKER & GARWOOD,

244 *Attorneys for Appellants, The Galveston, Harrisburg & San Antonio Railway Company, The New York, Texas and Mexican Railway Company, Gulf, Western Texas and Pacific Railway Company, and Galveston, Houston & Northern R'y Co.*

(Endorsed:) 23358. The State of Texas *vs.* The Galveston, Harrisburg & S. A. R'y Co. *et al.* Assignment of Error. Filed Jan'y 9, 1906, Jas P. Hart, Clerk.

Harrisburg & San Antonio Railway

Filed December 27, 1905.

In the District Court of Travis County, Texas, Twenty-sixth Judicial District.

No. 23358.

THE STATE OF TEXAS
vs.
G., H. & S. A. R'Y CO. ET AL.

Whereas, in the above entitled and numbered cause, pending in the District Court of Travis County, Texas, in the Twenty Sixth Judicial District and numbered 23358 upon the civil docket of said court, wherein the State of Texas is plaintiff and the Galveston, Harrisburg & San Antonio Railway Company, the New York, Texas & Mexican Railway Company, the Gulf, Western Texas & Pacific Railway Company and the Galveston, Houston & Northern Railway Company are defendants, a final judgment was rendered and entered on the 8th. day of December, 1905, that the State of Texas do have and recover of, from and against each of said defendants, severally, the following sums, to-wit:—

245 Against the defendant the Galveston, Harrisburg & San Antonio Railway Company the sum of 32,743.35 with interest thereon from date of said judgment at the rate of 6% per annum and all costs of suit;

Against the defendant, the New York, Texas & Mexican Railway Company, the sum of $2242.80 with interest thereon from date of said judgment at the rate of 6% per annum and all costs of suit;

Against the defendant, the Gulf, West Texas & Pacific Railway Company the sum of -659.86 with interest thereon from date at the rate of 6% per annum and all costs of suit;

Against the defendant, the Galveston, Houston & Northern Railway Company the sum of -5695.40 with interest thereon from date of said judgment at the rate of 6% per annum and all costs of suit; for each of which said sums so adjudged against each of said defendants, execution was directed severally to issue, and in favor of each of said defendants respectively against the State of Texas, that the State of Texas take nothing by its suit against said several defendants respectively for penalties and forfeitures herein and take nothing by its suit except the sums severally adjudged against each of said defendants respectively with interest thereon from date of said judgment and costs of suit; and

Whereas, each of said defendant-, as well as the said plaintiff, the State of Texas, in open Court excepted and gave notice of appeal to the Court of Civil Appeals of the State of Texas for the Third Supreme Judicial District; and,

Whereas, the said defendant, the Galveston, Harrisburg & San Antonio Railway Company, is desirous of perfecting said appeal and it by making and filing its supersedeas bond in due form of law;

246 Now, therefore, we, the undersigned, the Galveston, Harrisburg & San Antonio Railway Company, as principal, and Jake Keller and C. P. Pillot, as sureties, do hereby acknowledge ourselves bound to pay to the State of Texas, Appellee, and to the New York, Texas & Mexican Railway Company, the Galveston, Houston & Northern Railway Company and the Gulf, Western Texas & Pacific Railway Company the sum of sixty Eight Thousand Dollars ($68,000.00) for the payment of which well and truly to be made to said the State of Texas, the New York, Texas & Mexican Railway Company, the Galveston Houston & Northern Railway Company and the Gulf, Western Texas & Pacific Railway Company, we hereby bind ourselves, our heirs, administrators, successors and assigns jointly and severally by these presents, conditions- that the said the Galveston, Harrisburg & San Antonio Railway Company, Appellant, shall prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against it, it shall perform its judgment, sentence or decree and pay all such damages as said court may award against it.

Witness our hands this the 26th day of December, A. D. 1905.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,
By BAKER, BOTTS, PARKER & GARWOOD,
Its Attorneys.

JAKE KELLER, *Surety.*
C. G. PILLOT, *Surety.*

Approved Dec. 27, 1905.
JAS. P. HART, *Clerk.*

STATE OF TEXAS, *County of Harris:*

I, H. Y. Albrecht, Clerk of the District Court in and for
247 said County of Harris, do hereby certify that Jake Keller and C. G. Pillot, whose names appear signed to the annexed bond are in my opinion good and ample security for the amount therein specified, and that if said bond was offered to me for approval, the same would be accepted and approved.

To certify which, I hereunto set my hand and official seal this the 26th day of Dec. 1905.

HENRY ALBRECHT,
Clerk District Court, Harris County, Texas.
By F. W. BROWN, *Deputy.*

(Endorsed:) No. 23358. State of Texas *vs.* G. H. & S. A. Ry. Co. Appeal Bond of G. H. & S. A. Ry. Co. Filed Dec. 27, 1905, Jas. P. Hart, Clerk.

Supersedeas Bond of Galveston, Houston & Northern Railway Company.

Filed December 27, 1905.

In Dist. Court of Travis County, Texas, Twenty-sixth Judicial District.

No. 23358.

STATE OF TEXAS
vs.
G., H. & S. A. RY. CO. ET AL.

Whereas, in the above entitled and numbered cause, wherein the State of Texas is plaintiff and the Galveston, Harrisburg *A* San Antonio Railway Company, the New York, Texas & Mexican Railway Company, the Gulf, Western Texas & Pacific Railway Company and the Galveston, Houston & Northern Railway Company are each defendants, pending in the District Court of Travis County, Texas, in the Twenty-Sixth Judicial District and numbered 23,358 on
248 the civil docket of said Court, a final judgment was on the 8th day of December, 1905, rendered and entered in favor of the State of Texas and against each of said defendants that the State of Texas do have and recover of and from each of said defendants respectively the following sums, that is to say:

Against the defendant, the Galveston, Harrisburg & San Antonio Railway Company the sum of $32,743.35, with interest thereon from the date of said judgment at the rate of 6% per annum and all costs of suit;

Against the defendant, the New York, Texas & Mexican Railway Company the sum of 2242.80, with interest thereon from date of said judgment at the rate of 6% per annum, and all costs of suit;

Against the defendant, the Gulf, Western Texas & Pacific Railway Company the sum of 659.86 with interest thereon from date of said judgment at the rate of 6% per annum and all costs of suit;

Against the defendant, the Galveston, Houston & Northern Railway Company, the sum of 5695.40 with interest thereon from date of said judgment at the rate of 6% per annum and all costs of suit; and execution was directed to issue against said defendants severally for the collection of the amounts so adjudged; and in favor of said defendant respectively and against the State of Texas, that the said State of Texas take nothing by its suit for penalties and forfeitures against each of said defendants and take nothing by its said suit against each of said defendants, except the amount hereinabove set out, adjudged again-t each of said defendants severally, with interest and costs, as hereinabove stated; and,

Whereas, each of said defendants, as well as the State of
249 Texas, in open court excepted to said judgment and gave notice of appeal to the Court of Civil Appeals of the State of Texas, for the Third Supreme Judicial District; and,

Whereas, the said Galveston, Houston & Northern Railway Company is desirous of perfecting its said appeal and suspending the execution of said judgment by making and filing its supersedeas bond in due form of law;

Now, therefore, we, the undersigned, the Galveston, Houston & Northern Railway Company, as principal, and Jake Keller and C. G. Pillot, as sureties, do hereby acknowledge ourselves bound to pay to the State of Texas and to the Galveston, Harrisburg & San Antonio Railway Company, the New York, Texas & Mexican Railway Company and the Gulf, Western Texas & Pacific Railway Company the sum of Thirteen Thousand Dollars ($13,000.00) for the payment of which well and truly to be made to the said State of Texas, the Galveston, Harrisburg & San Antonio Railway Company, the New York, Texas & Mexican Railway Company, and the Gulf, Western Texas & Pacific Railway Company, we hereby bind ourselves, our heirs, administrators, successors, and assigns, jointly and severally by these presents, conditioned that the said Galveston, Houston & Northern Railway Company, Appellant, shall prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against it, it shall perform its judgment, sentence or decree and pay all such damages as said court may award against it.

Witness our hands this the 26th day of December, A. D. 1905.

GALVESTON, HOUSTON & NORTHERN RAILWAY COMPANY,
250 By BAKER, BOTTS, ARKER & GARWOOD,
Its Attorneys.

JAKE KELLER, *Surety.*
C. G. PILLOT, *Surety.*

Approved Dec. 27, 1905.
JAS. P. HART, *Clerk.*

STATE OF TEXAS, *County of Harris:*

I, Hy. Albrecht, Clerk of the District Court in and for said County of Harris, do hereby certify that Jake Keller and C. G. Pillot, whose names appear signed to the annexed bond are in my opinion good and ample security for the amount therein specified, and that if said bond was offered to me for approval, the same would be accepted and approved.

To certify which, I hereunto set my hand and official seal this 26th day of December, 1905.

HENRY ALBRECHT,
Clerk District Court, Harris County, Texas.
By F. W. BROWN, *Deputy.*

(Endorsed:) No. 23,358. State of Texas, *vs.* G. H. & S. A. Ry. Co. *et al.* Appeal Bond. Filed Dec. 27, 1905, Jas. P. Hart, Clerk.

Supersedeas Bond of New York, Texas & Mexican Railway Company.

Filed December 27, 1905.

In District Court of Travis County, Twenty-sixth Judicial District.

No. 23358.

STATE OF TEXAS
vs.
G., H. & S. A. RY. CO. ET AL.

251 Whereas, in the above entitled and numbered cause, wherein the State of Texas is plaintiff and the Galveston, Harrisburg & San Antonio Railway Company, the New York, Texas & Mexican Railway Company, the Gulf, Western Texas & Pacific Railway Company and the Galveston, Houston & Northern Railway Company are each defendants, pending in the District Court of Travis County Texas, in the Twenty Sixth Judicial District and numbered 23358 on the civil docket of said court, a final judgment was on the 8th day of December, 1905, rendered and entered in favor of the State of Texas and against each of said defendants, that the State of Texas do have and recover of and from each of said defendants respectively, the following sums, that is to say:—

Against the defendant, the Galveston, Harrisburg & San Antonio Railway Company the sum of $32,743.35, with interest thereon from the date of said judgment at the rate of 6% per annum and all costs of suit;

Against the defendant, the New York, Texas & Mexican Railway Company the sum of 2242.80, with interest thereon from date of said judgment at the rate of 6% per annum and all costs of suit;

Against the defendant, the Gulf, Western Texas & Pacific Railway Company the sum of 659.86, with interest thereon from date of said judgment at the rate of 6% per annum and all costs of suit;

Against the defendant, the Galveston, Houston & Northern Railway Company, the sum of 5695.40, with interest thereon from date of said judgment at the rate of 6% per annum and all costs of suit:

and execution was directed to issue against said defendants
252 severally for the collection of the amounts so adjudged; and in favor of said defendants respectively and against the State of Texas, that the said State of Texas take nothing by its suit for penalties and foreitures against each of said defendants and take nothing by its said suit against each of said defendants, except the amount hereinabove set out, adjudged against each of said defendants severally, with interest and costs, as hereinabove stated; and,

Whereas, each of said defendants, as well as the State of Texas, in open court excepted to said judgment and gave notice of appeal to the Court of Civil Appeals of the State of Texas, for the Third Supreme Judicial District, and,

Whereas, the said New York, Texas & Mexican Railway Company is desirous of perfecting its said appeal and suspending the execution of said judgment by making and filing its supersedeas bond in due form of law;

Now, therefore, we, the undersigned, the New York, Texas & Mexican Railway Company as principal, and Jake Keller and C. G. Pillot, as sureties, do hereby acknowledge ourselves bound to pay to the State of Texas, the Galveston, Harrisburg & San Antonio Railway Company, the Galveston, Houston & Northern Railway Company, and the Gulf, Western Texas & Pacific Railway Company, the sum of Sixty Five Hundred Dollars ($6500.00) for the payment of which well and truly to be made, we hereby bind ourselves, our heirs, administrators, and assigns, jointly and severally by these presents, conditioned that the said, the New York, Texas & Mexican Railway Company, Appellant, shall prosecute its appeal with
253 effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against it, it shall perform its judgment, sentence or decree and pay all such damages as said court may award against it.

Witness our hands this the 26th. day of December, A. D. 1905.

NEW YORK, TEXAS & MEXICAN RAILWAY COMPANY,
By BAKER, BOTTS, PARKER & GARWOOD,
Its Attorneys.

JAKE KELLER, *Surety.*
C. G. PILLOT, *Surety.*

Approved, Dec. 27, 1905.
JAS. P. HART, *Clerk.*

THE STATE OF TEXAS, *County of Harris:*

I, Hy. Albrecht, Clerk of the District Court in and for said County of Harris, do hereby certify that Jake Keller and C. G. Pillot, whose names appear signed to the annexed bond are in my opinion good and ample security for the amount therein specified, and that if said bond was offered to me for approval, the same would be accepted and approved.

To certify which, I hereunto set my hand and official seal this 26th. day of December, 1905.

HENRY ALBRECHT,
Clerk District Court, Harris County, Texas,
By F. W. BROWN, *Deputy.*

(Endorsed:) No. 23,358. State of Texas *vs.* G. H. & S. A. Ry. Co. Appeal Bond of N. Y. T. & M. Ry. Co. Filed Dec. 27, 1905, Jas. P. Hart, Clerk.

254 *Supersedeas Bond of Gulf, West Texas & Mexican Railway Company.*

Filed December 27, 1905.

In the District Court of Travis County, Twenty-sixth Judicial District.

No. 23358.

STATE OF TEXAS
vs.
G., H. & S. A. RY. CO. ET AL.

Whereas, in the above entitled and numbered cause, wherein the State of Texas is plaintiff and the Galveston, Harrisburg & San Antonio Railway Company, the New York, Texas & Mexican Railway Company, the Gulf, Western Texas & Pacific Railway Company and the Galveston, Houston & Northern Railway Company are each defendants, pending in the District Court of Travis County, Texas, in the Twenty Sixth Judicial District and numbered 23358 on the civil docket of said court, a final judgment was on the 8th. day of December, 1905, rendered and entered in favor of the State of Texas and against each of said defendants, that the State of Texas do have and recover of and from each of said defendants respectively the following sums, that is to say:—

Against the defendant, the Galveston, Harrisburg & San Antonio Railway Company the sum of $32,743.35 with interest thereon from the date of said judgment at the rate of 6 % per annum and all costs of suit;

Against the defendant, the New York, Texas & Mexican Railway Company the sum of 2242.80, with interest thereon from date of said judgment at the rate of 6% per annum, and all costs of suit;

255 Against the defendant, the Gulf, Western Texas & Pacific Railway Company the sum of 659.86, with interest thereon from date of said judgment at the rate of 6 % per annum and all costs of suit;

Against the defendant, the Galveston, Houston & Northern Railway Company the sum of 5695.40, with interest thereon from date of said judgment at the rate of 6 % per annum and all costs of suit; and execution was directed to issue against said defendants severally for the collection of the amounts so adjudged; and in favor of said defendants respectively and against the State of Texas, that the said State of Texas take nothing by its suit for penalties and forfeitures against each of said defendants and take nothing by said suit against each of said defendants, except the amount hereinabove set out adjudged against each of said defendants severally, with interest and costs, as hereinabove stated; and,

Whereas, each of said defendants, as well as the State of Texas, in open court excepted to said judgment and gave notice of appeal

to the Court of Civil Appeals of the State of Texas, for the Third Supreme Judicial District; and,

Whereas, the said Gulf, Western Texas & Pacific Railway Company is desirous of perfecting its said appeal and of suspending the execution of said judgment by making and filing its supersedeas bond in due form of law;

Now, therefore, we, the undersigned, the Gulf, Western Texas & Pacific Railway Company, as principal and C. G. Pillot and Jake Keller, as sureties, do hereby acknowledge ourselves bound to pay to the State of Texas and to the Galveston, Harrisburg & San Antonio Railway Company, the New York, Texas & Mexican Railway
256 Company and the Galveston, Houston & Northern Railway Company the sum of Twenty Five Hundred Dollars ($2500.00) for the payment of which well and truly to be made to the said State of Texas, the Galveston, Harrisburg & San Antonio Railway Company, the New York, Texas & Mexican Railway Company and the Galveston, Houston & Northern Railway Company, we hereby bond ourselves, our heirs, administrators, successors and assigns, jointly and severally by these presents, conditioned that the said Gulf Western Texas & Pacific Railway Company, Appellant, shall prosecute its appeal with effect and in case the judgment of the Supreme Court, or the Court of Civil Appeals shall be against it, it shall perform its judgment, sentence or decree and pay all such damages as said court may award against it.

Witness our hands this the — day of December, A. D. 1905.

GULF, WESTERN TEXAS & PACIFIC RAILWAY COMPANY,
By BAKER, BOTTS, PARKER & GARWOOD,
Attorneys.

C. G. PILLOT, *Surety.*
JAKE KELLER, *Surety.*

Approved, Dec. 27, 1905.
JAS. P. HART, *Clerk.*

STATE OF TEXAS, *County of Harris:*

I, Hy. Albrecht, Clerk of the District Court in and for said County of Harris, do hereby certify that Jake Keller and C. G. Pillot, whose names appear signed to the annexed bond are in my opinion good and ample security for the amount therein specified, and that if said bond was offered to me for approval, the same would be accepted and approved.

To certify which, I hereunto set my hand and official seal this 26th day of Dec. 1905.

257 HENRY ALBRECHT,
Clerk District Court, Harris County, Texas,
By F. W. BROWN, *Deputy.*

(Endorsed:) No. 23358. State of Texas *vs.* G. H. & S. A. Ry. Co. *et al.* Appeal Bond of G. W. T. & P. Ry. Co. Filed Dec. 27, 1905. Jas. P. Hart, Clerk.

258 *Cross Assignments of Error.*

Filed January 29, 1906.

In District Court of Travis County, 26th Judicial District of Texas.

No. 23358.

THE STATE OF TEXAS
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL.

Now comes the plaintiff, the State of Texas, in the above entitled and numbered cause, and presents and files the following cross assignments of error to the action of the District Court upon the trial of said cause, to-wit:

First Cross Assignment of Error.

The Court erred in sustaining the 26th paragraph or subdivision of defendants' special demurrer No. III, same being as follows, viz:

"That it appears upon the face of said Act that in no event can plaintiff recover the total amount of one per cent. on defendants' gross receipts for the year ending June 30th, 1905, but for only such proportion therof as the time from July 17th, 1905, to the end of the year bears to the entire year."

Second Cross Assignment of Error.

The Court erred in sustaining the 27th paragraph or subdivision of defendants' special demurrer No. III, same being as follows, viz:

"That it appears upon the face of said Act that plaintiff is not entitled to recover, in any event, one per cent. upon defendants' receipts from whatsoever source derived but that said recovery
259 should be limited to one per cent. of the receipts derived from the transportation of freight, passengers and baggage only."

Third Cross Assignment of Error.

The Court erred in overruling plaintiff's general demurrer to the answer of defendants, said general demurrer being as follows, viz:

"Plaintiff demurs to said answer, and to each and every allegation thereof, and says the same presents no legal defense to plaintiff's cause of action as set forth in the original petition in this cause; and of this plaintiff prays judgment of the court."

Fourth Cross Assignment of Error.

The Court erred in rendering judgment in favor of plaintiff against the defendants, respectively, for only an amount equal to 169/365ths of one per cent., estimated and calculated upon the gross receipts of such defendants, respectively, for the year ending on the

30th day of June, 1905, derived from the occupation of the transportation by defendants, respectively, for hire, including such receipts derived by defendants, respectively, from the transportation of passengers, freight, baggage mail and express matter.

Fifth Cross Assignment of Error.

The Court erred in not rendering judgment in favor of plaintiff against defendants, respectively, for the full amount of taxes prayed for in plaintiff's petition.

Sixth Cross Assignment of Error.

The Court erred in finding and holding that plaintiff was not entitled to recover of defendants, respectively, any penalties
260 whatever in this cause.

Seventh Cross Assignment of Error.

The Court erred in finding and holding that plaintiff was not entitled to recover of defendants, respectively, any forfeiture whatever in this cause.

Eighth Assignment of Error.

The Court erred in not rendering judgment in favor of plaintiff against defendants, respectively, for the full amount of penalties prayed for in plaintiff's petition.

Ninth Assignment of Error.

The Court erred in not rendering judgment in favor of plaintiff against the defendants, respectively, for the full amount of forfeitures prayed for in plaintiff's petition down to and including the day upon which this suit was filed.

Tenth Cross Assignment of Error.

The Court erred in not rendering judgment in this cause in favor of plaintiff against the defendants, respectively, for the full amount of taxes, penalties and forfeitures down to and including the day on which this suit was filed, together with interest thereon from date of judgment in this cause, all as prayed for in plaintiff's petition.

Eleventh Cross Assignment of Error.

The Court erred in not rendering judgment in favor of plaintiff against the defendants, respectively, in all respects as prayed for in plaintiff's petition, including forfeitures down to an- embracing the date of judgment.

Twelfth Cross Assignment of Error.

The Court erred in excluding from the gross receipts of
261 defendants, respectively, for the year ending on the 30th day of June, 1905 (which gross receipts form the basis of computation of the amount of tax of defendants, respectively, for the year 1905, under Chapter 141, General Laws of the Twenty-ninth Legislature of Texas, pages 336-338) the items of "car service" received by defendants, respectively, as set out in the answer of defendants, the respective amounts of such items being as follows, viz:

Galveston, Harrisburg & San Antonio Ry. Co.....	$293,792.73
New York, Texas & Mexican Ry Co.....	21,626.76
Gulf, Western Texas & Pacific Ry. Co.....	11,155.43
Galveston, Houston & Northern Ry. Co.....	14,717.12

Thirteenth Cross Assignment of Error.

The Court erred in excluding from the gross receipts of defendants, respectively, for the year ending on the 30th day of June, 1905 (which gross receipts form the basis for computation of the amount of the tax of defendants, respectively, for the year 1905, under Chapter 141, General Laws of the Twenty-ninth Legislature of Texas, pages 336-338) the items of "locomotive mileage" received by defendants, respectively, as set out in the answer of defendants, the respective amounts of such items being as follows, viz:

Galveston, Harrisburg & San Antonio Ry. Co.....	$107,877.04
New York, Texas & Mexican Ry. Co.....	3,435.98
Gulf, Western Texas & Pacific Ry. Co.....	1,838.50
Galveston, Houston & Northern Ry. Co.....	3,330.40

R. V. DAVIDSON,
Attorney General,
262 W. E. HAWKINS,
Assistant Attorney General, for the State of Texas, Plaintiff.

(Endorsed:) 23358. State of Texas *vs.* Galveston, Harrisburg and San Antonio Ry. Co. Plaintiff's Cross Assignments of Error. Filed Jan'y 29, 1906, Jas. P. Hart, Clerk.

263 *Bill of Costs.*

In District Court, Travis County, Texas.

No. 23358.

THE STATE OF TEXAS
vs.
GALVESTON, HOUSTON & SAN ANTONIO RAILWAY COMPANY ET AL.

Clerk's Costs.

Docketing Suit	$.20
Entering Appearances	.75
Filing 10 papers	1.50
Entering Judgment	2.00
Copy of Judgment	1.75
Taking Affidavit	.50
Approving 4 Bonds	6.00
Assessing damages	.50
Filing & Certifying Brief	.90
Taxing Costs	.25
Transcript	171.45
Clerk's Costs forwarded	$185.80

Sheriff's & Miscellaneous Costs.

Clerk's Costs brought forward	$185.80
Travis County, Stenographer Fee	3.00
G. S. Matthews, Sheriff, venire fee	.50
Total Costs	$189.30

264 *Clerk's Certificate.*

THE STATE OF TEXAS, *County of Travis:*

I, Jas. P. Hart, Clerk of the District Court, within and for the County and State aforesaid, do hereby certify that the above and foregoing on 263 pages is a true and correct Transcript of all proceedings had in cause No. 23,358, of the State of Texas *versus* The Galveston, Harrisburg & San Antonio Railway Company, *et al.*, as the same appear of record and on file in this office.

Witness my hand and seal of office, at Austin, Texas, this the 1st. day of February, A. D. 1906.

JAS. P. HART,
Clerk District Court, Travis County, Texas.

265 (Endorsed:) Transcript cover. No. 3882. Galveston, Harrisburg & San Antonio Ry. Co. *et al.*, Appellants, *vs.* The State of Texas, Appellee. From the District Court of Travis

County, for the 26th. Judicial District of Texas, at Austin, Texas. Applied for by Baker, Botts, Parker & Garwood, Attorneys for Appellants, on the 29th. day of January, A. D. 1906, and delivered to the above named attorneys on the 4th. day of February, 1906. Jas. P. Hart, Clerk of the District Court of Travis County. Filed in Court of Civil Appeals, third Supreme Judicial District, Austin, Texas, Feb. 27, 1906, R. H. Connerly, Clerk. No. 1594. 3rd. District. Filed in Supreme Court of Texas September 5, 1906. F. T. Connerly, Clerk, by J. S. Myrick, Deputy.

266 *Proceedings in the Court of Civil Appeals, Third Supreme Judicial District, at Austin.*

Opinion.

Filed March 21, 1906.

No. 3749.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY CO. ET AL.
vs.
R. V. DAVIDSON ET AL.

No. 3746.

TEXAS & PACIFIC RAILWAY COMPANY
vs.
JOHN W. STEPHENS ET AL.

No. 3744.

GULF, COLORADO & SANTA FE RAILWAY CO. ET AL.
vs.
R. V. DAVIDSON ET AL.

No. 3757.

MISSOURI, KANSAS & TEXAS RAILWAY CO. OF TEXAS
vs.
R. V. DAVIDSON ET AL.

No. 3759.

INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY
vs.
JOHN W. STEPHENS ET AL.

No. 3761.

ST. LOUIS, SOUTHWESTERN RAILWAY COMPANY OF TEXAS
vs.
R. V. DAVIDSON ET AL.

267 The above styled cases are on appeal in this Court from the District Court of Travis County, and they will all be

considered together and disposed of in this opinion; and we here take occasion to say that there are a number of cases pending in this Court in suits brought by the State against these appellants and other railroad corporations operating roads in Texas, to recover the tax mentioned in the Act pointed out in this opinion. In those cases judgments were rendered in favor of the State for a part of the taxes sued for. The disposition of the present cases will dispose of the other cases to which the opinion herein is also intended to apply. Some of the railways involved in this controversy are located partly within and partly without the State. Others are situated wholly within the State. The statement of the nature and result of the suit which applies to all of the present cases, is substantially stated in the brief of the Galveston, Harrisburg & San Antonio Railway Company, which is as follows:

"This is a suit brought by the appellants against Robert Vance Davidson, Attorney General of the State of Texas; John W. Stephens, Comptroller of the State of Texas, and John W. Robbins, Treasurer of the State of Texas, for the purpose of enjoining them from taking any action in the matter of estimating, assessing or attempting to enforce the collection of a certain tax, purported to be levied upon the appellants and other railways of the State of Texas by an act of the 29th. Legislature of the State of Texas, entitled 'An Act imposing a tax upon railroad corporations, the receivers thereof, and other persons, firms and associations
268 of persons owning, operating, managing or controlling any line of railroad in this State for the transportation of passengers, freight and baggage, or either, equal to one per cent. of their gross receipts, and providing for the collection and payment thereof, and repealing the existing tax on gross passenger earnings of railroads,' which act was approved April 17th, 1905, and took effect ninety days after the adjournment of the Legislature; that is, upon the 17th. day of July, 1905. For convenience, said act will hereinafter be referred to as the 'Gross Receipts Tax Bill,' a copy of which is attached to appellants' petition herein.

"The grounds on which the injunction was sought are set up in full in appellants' petition and are, in substance, as follows: The lines of railway owned and operated by appellants are situated wholly within the State of Texas, and appellants are, by the laws of the State of Texas, and of the United States, authorized to connect with other lines of railway in said State, or lines outside of the State at the State line, thereby constituting through lines for the transportation of goods, wares and merchandise, express matter, mails and passengers between points in the State of Texas, and between points in said State and points in other states and territories of the United States and foreign countries. That appellants are now and had been for many years prior to the passage of said Gross Receipts Tax Bill, common carriers of freight and passengers, and required by the Constitution and laws of the State of Texas, and the Constitution and laws of the United States, to receive and transport freight and passengers between said points within the State of

Texas, and between points in said State and between other
269 points in the United States and foreign countries, and that as to such latter transportation they are, and have been since their existence as corporations, interstate and international carriers of such transportation. That for the year ending June 30, 1905, they received for the transportation of interstate and international commerce a large portion of their gross receipts, an accurate statement of their gross receipts from such sources, and from interstate business, as well as from the carriage of mail and express matter and other sources, being set forth in detail in appellants' said petition. That by the terms of said Gross Receipts Tax Bill, the said John W. Stephens was required to estimate, assess and enforce the collection from appellants of one per cent. upon their entire gross receipts derived from all sources, and appellants allege in their petition that such tax is unconstitutional and void, because same is in violation of the third subdivision of section 8, article 1 of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes, and is in violation of the Constitution and laws of the United States.

"That the Constitution of the State of Texas provides that property shall be taxed only in proportion to its value, and that all taxation must be equal and uniform, and that all property of railroad companies must be assessed by the tax assessors of the several counties in which said property is situated, including so much of the roadbed and fixtures as is in each county, except that the rolling stock may be assessed in the county where the principal office of the company is located, and requires the Comptroller to apportion the assess-
270 ment of such rolling stock among the several counties through which the road runs in proportion to the distance it runs in each county. That said Constitution of the State also provides, that all property, whether owned by persons or corporations, must be assessed for taxes and the taxes paid in the county where situated, excepting that the taxes of non-residents may, by a two-third vote of the Legislature, be authorized to be paid at the office of the Comptroller; and also provides for the election in each county of a tax assessor to assess the property of persons and corporations for taxation, and constitutes the commissioners' courts of the respective counties of the State a board of equalization, with power and authority to equalize, as near as may be, the valuation of all property subject to or rendered for taxation. That in pursuance of said constitutional provisions the Legislature of the State has heretofore passed laws in accordance therewith, and property in the State, whether owned by natural persons or corporations, has been subjected to such local assessments for taxation by the assessors, and has been equalized by the board of equalization, constituted as aforesaid. That the assessors, in making such assessments, and the boards of equalization of the respective counties in approving and equalizing the same, are required by law to give a just, fair and proper valuation of all property subject to taxation, and their action in making the assessment is not subject to revision by any tribunal or department of govern-

ment, but the same is made final and conclusive when approved by the board of equalization, and is a judicial determination of the value of the property assessed, which is final and conclusive and not
271 subject to review by any authority in the State of Texas. That appellants, in accordance with the Constitution and laws of the State, rendered to the assessors of taxes in the respective counties through which their said lines of railway run and in which they are situated, and the assessors of taxes in each of said counties assessed, and the boards of equalization approved and equalized all of appellants' property situated in each of said counties respectively, including their rolling stock which was assessed and the assessment approved, as aforesaid, for the year 1905; and the action and judgment of said several assessors in assessing the same, and the action and judgment of the several boards of equalization in approving and equalizing such assessments has become final, and now fixes and establishes the value of all of appellants' property for taxation situated and being in the State of Texas, and there is no method provided by or known to the law for the revision of such assessments and valuations. That all taxes to which appellants are subject for State and county purposes are included in such assessments, and appellants will be compelled to pay, and will pay, the taxes assessed against them for the year 1905, as aforesaid. That there are various independent school districts organized in said state and various organized cities, towns and villages through which appellants' said lines of railway run, which have in like manner, by authority of the Constitution and laws of the State assessed and levied against appellants' property situated in such school districts, cities, towns and villages, respectively for the year 1905, the taxes authorized to be levied by them, and these appellants will be compelled to pay
272 the taxes so levied and assessed. That the latter assessments are and will be equalized and fixed by the authorities of such cities, towns, villages and school districts in the manner provided by law, and have and will thereby become fixed, established and conclusive without any power of revision in any department of the government of the State. That in like manner, the property of other tax payers situated in said counties, school districts, cities, towns and villages through which appellants' lines of railway run, has been assessed and the assessments approved and equalized, and such assessment, so approved and equalized have become final in the case of appellants' property, as aforesaid. That by such proceedings, and by the action and judgment of the assessors and boards of equalization of the respective counties and school districts, cities, towns and villages the value of appellants' property and the property of other taxpayers situated therein is determined and fixed for taxation, and the values thereof are equalized in accordance with law, and the burden of taxes and expenses of government, as thereby determined, equalized, apportioned and fixed is in proportion to the value of the property so rendered, assessed and equalized, which is final and conclusive. That an itemized statement of the renditions of appellants' property is set out and contained in said petition.

"That in like manner the property of appellants has been assessed

and the assessments approved and equalized and the taxes paid thereon for the several years next preceding the year 1905, and that for all years since appellants have been corporations, they have paid the taxes legally assessed against them up to the year 1905, and
273 will pay for that year the taxes assessed against them upon the valuations above referred to. That by the payment of said taxes, appellants have paid, and will pay, the proportion of taxes justly due by them, and have and will thereby bear their just and proportionate burden of taxation on the value of property as compared to the taxes paid and burdens borne by other taxpayers in the respective counties where appellants' property is situated, and that the attempted levy of one per cent. tax upon the gross receipts of appellants, as by said bill provided, is an attempted unjust and arbitrary discrimination against appellants and other railroad corporations of the State of Texas, and in favor of other tax payers and of other property in said State, and is therefore void, because it violates the Fourteenth amendment of the Constitution of the United States, and the Constitution of the State of Texas, and especially section 1 of article 8 of the Constitution of the State of Texas, which provides that taxes shall be equal and uniform, and that all property shall be assessed and taxed in proportion to its value; and is in further violation of said section 1, article 8, which authorizes the Legislature to tax incomes of both natural persons and corporations, other than municipal, because said Gross Receipts Tax Bill does not levy or purport to levy, and the other statutes of the State of Texas do not levy or purport to levy, an equal and uniform tax on the incomes of natural persons and corporations, other than municipal; and further violates said section 1, article 8, of the Constitution, because the same prohibits the taxing of property and levying of an income tax derived from the use of such property, for the reason that the same would be
274 double, unequal and discriminatory taxation, and is not such an income tax as was contemplated by such section of the Constitution.

"That said Gross Receipts Tax Bill is unconstitutional and void because it denies the equal protection of the law guaranteed by section 1, Article 14, of the amendment of the Constitution of the United States in this: That thereby a tax of one per cent. on their gross receipts is imposed, while by section 19, article 8, of the Constitution of the State of Texas, incomes from lands used for farming purposes are exempt from taxation, which incomes from lands constitute at least 80 per cent. of the wealth produced in the State of Texas, and to exempt such property from taxation and to tax the income from lands and property owned by railroad corporations, the roadbed and right of way of appellants being lands and real preperty, is to deprive the appellants of equal protection of the law guaranteed by the Constitution of the United States.

"The appellants, in addition to the property tax which they have been compelled to pay, as aforesaid, were by the act of the Legislature of the State of Texas, approved March 1, 1905, compelled to pay a franchise tax, in accordance with the provision of said act, as more fully appears in said petition; and are also under the provisions of

the laws of the State of Texas compelled to pay one per cent. upon their gross passenger revenues earned within the State of Texas for the year ending June 30, 1905, as more fully appears from said petition. That such passenger receipts will likewise be included in the gross receipts tax by the said Gross Receipts Tax Bill for the year 1905, and thereby appellants will be compelled to pay a
275 double tax upon their gross passenger revenues earned within the State of Texas for that portion of said year prior to June 30th.

"Appellants further allege that the appellees were attempting to estimate, assess and enforce appellants to pay one per cent. on their gross receipts for the year commencing July 1st, 1904, and ending June 30th, 1905, as a tax for the year beginning January 1st and ending December 31st, 1905, when said Gross Receipts Tax Bill did not become a law until July 17, 1905, which was an attempt upon their part to enforce said law as a retroactive or retrospective law, in violation of the Constitution of the State of Texas.

"Appellants alleged that they had reported to appellee John W. Stephens, Comptroller, under protest, the amount of their gross receipts for the year ending June 30, 1905, a copy of which report and protest is attached to appellants' petition.

"And further alleged that they could not tender into court the payment of any part of said tax, because suit was brought for the purpose of testing the validity of said act; and further, because under the terms of said act they were not authorized to pay or tender the payment of said tax or any part thereof, until the same had been estimated and assessed, or until the same had been established and the amount thereof fixed by judicial decree.

"Appellants further alleged in their petition that they were railway corporations and common carriers engaged in interstate and international commerce by transporting freight, passengers, baggage, express matter and mails by themselves and through their connections between points in Texas and points in other states of the United States and foreign countries, and were United States post-roads, engaged in the carriage of interstate and state mails
276 by contract with the United States government, and that all of their property situated in the State of Texas had been assessed and taxes paid therein in proportion to its value as compared with other property, and that they had thereby borne their proportionate burden of taxation, and that the tax attempted to be levied by said Gross Receipts Tax Bill was in addition to the tax paid by them upon their property, and was an attempt to add to the taxation of appellants' property the burden of a tax upon the privilege of using, conducting and operating an instrumentality of interstate and international commerce, and an instrumentality used by the goverment of the United States in the performance of its sovereign duties and privileges, towit: that of disseminating the United States mails. That a large amount of their receipts were derived and received from the Government of the United States for the services rendered in carrying said mails, all of which more fully appears by the allegations of said petition, and that the levy of such

tax is a burden, hindrance and impediment to their interstate and foreign commerce, contrary to subdivision 3 of section 8, article 1 of the Constitution of the United States, and in violation of section 1 of the Fourteenth amendment to said Constitution.

"Appellants further allege that the appellees would contend that said tax was an excise or occupation tax, and appellants protesting that the same is in truth and in fact, a property tax, averred that if the same is held to be an occupation tax, it is a tax upon the privilege of conducting an interstate and international business and of
277 performing a function of the government of the United States, towit, the transportation of the United States mails, state, interstate and international, and is therefore invalid and void. That as an occupation tax it is also in violation of section 2, article 8, of the Constitution of the State of Texas, which provides that all occupation taxes shall be equal and uniform upon the same class of subjects in this; that said tax is not laid upon other occupations of the same class, because other public service transportation companies, such as street railways, electric interurban railway companies transporting freight and passengers, or upon common carriers upon the rivers, canals, bayous, lakes and bays of said State are not subject to such tax, while in fact such competition affects a large proportion of the business of appellants—probably one-half thereof—and a failure to place such tax upon the competitors of appellants is a discrimination and an unfair advantage in their favor, and also deprives appellants of the equal protection of the law guaranteed by the Constitution of the United States and amendments thereto.

"Appellants further allege that they were chartered by the State of Texas, with power to do and perform the acts and things usually incident to the transportation of the business of a railroad corporation, including the transportation of passengers, freight, and baggage, state, interstate and international, which powers and franchises were to continue during the existence of appellants as corporations; that said charters are valid and existing contracts between appellants and the State of Texas, granting to appellants the right to exercise the franchises and perform the duties therein authorized, and
278 that the levy of said tax is an arbitrary, unequal and confiscatory burden, and operates to impair the obligation of said contract, in violation of section 10, article 1, of the Constitution of the United States, which provides that no state shall pass any law impairing the obligations of contracts.

"Appellants further alleged that said bill in providing for a penalty of $200 per day against every railway corporation failing or refusing to pay such tax is unconstitutional and void, and in violation of section 1 of the Fourteenth amendment to the Constitution of the United States, in that it deprives appellants of their property without due process of law, and denies to them the equal protection of the law, and is contrary to the Bill of Rights of the State of Texas, which provides in section 13, article 1 of said Constitution, that all courts shall be open, and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, because the imposition of said excessive and confiscatory pen-

alties were inserted in said bill for the purpose of preventing appellants and other corporations, or persons similarly situated, from testing the validity of the same in the courts of the country, although they should believe, as they do, that the same is invalid and void, and is also in violation of section 25, article 3 of the Constitution, because the title of the bill does not enclude the penalties.

"Appellants further claimed that said bill was unconstitutional by reason of being indefinite and uncertain in that it was impossible to determine therefrom the amount of tax that should be paid for the year 1905, and was also void because the Constitution of
279 the State limits the tax on property for State purposes to thirty five cents on the $100 valuation, whereas, by said act it would require appellants to pay very much more than thirty five cents on the $100 valuation of their property, and was in violation of Section 18, Article 1 of the Constitution, which prohibits the Legislature from enacting an *ex post facto* law, retroactive law or law impairing the obligation of contracts.

"Appellants further allege that their lines of railway are operated through a number of organized counties, cities, towns and villages of the State of Texas, which by the Constitution of the State of Texas are authorized to levy an occupation tax in an amount equal to one-half of that levied by the State upon any occupation pursued in such counties, cities, towns and villages, and if the tax levied by said Gross Receipts Tax Bill is an occupation tax, and such counties, cities, towns and villages are authorized to levy one-half thereof upon appellants, that the same will be confiscatory in amount and character, and would burden, impede, *hindred* and obstruct commerce between the states and with foreign nations, contrary to the provisions of section 3, article 8, of the Constitution of the United States, and would be so grossly excessive and discriminatory in its nature as to amount to a confiscation of appellants' property and to deprive them of the equal protection of the law in violation of the constitution of the United States and of the State of Texas.

"The full and complete allegations of appellants' petition are herein referred to, to be found in the transcript as aforesaid,
280 upon which allegations appellants prayed and asked the court to enjoin appellees from proceeding under said bill, either in estimating, assessing or enforcing the collection of said tax, and asked for a temporary restraining order to continue in force until the final hearing; and further asked the court that if upon final hearing the court should determine that appellants should pay such tax, or any part thereof, that the court would by its decree, fix and determine the amount thereof, and that so much of the same as appellants were not required to pay should be enjoined, and that the appellees should be enjoined from further proceeding against appellants under said Gross Receipts Tax Bill.

"Said petition further showed as grounds for relief by injunction that John W. Robbins, Treasurer of the State of Texas, was personally unable to respond in damages for the injury which was about to be inflicted, and did not have property subject to execution exceeding $5000 in value, and that the tax purported to be levied by

said Gross Receipts Tax Bill would aggregate more than $650,000 and that there was no authority granted by statute in the State of Texas, or otherwise, whereby suit could be maintained against the State to recover the taxes so paid, and no provision for the payment of any judgment that might be obtained therefor. Said Petition also showed that by reason of the provisions of said bill which required the Comptroller to enforce the collection of the tax and penalties for the non-paymant thereof, there would result a multiplicity of suits from such attempted enforcement, the cost and expenses of which would amount to large sums of money, and
281 the bringing to trial of the same would entail further injuries upon the parties claimed to be subject to such tax. It also showed that said tax and any judgment rendered therefor, would be a lien upon the property of the railway company against whom the same was claimed, and would be a cloud upon the title of such property, and would lessen the market value of the same. Said petition also showed that by reason of said act being unconstitutional and void, petitioner was entitled to the relief demanded, and that such relief required the restraint of the act of the Comptroller in attempting to estimate, assess and enforce the collection of said tax, and the restraint of the attorney general and treasurer in assisting him in doing the same, because such acts would be prejudicial to the petitioner. By all of which allegations it was shown that there was no adequate remedy at law.

"Appellees appeared first by plea setting up a claim that this was a suit against the State, which plea was by the court overruled.

"Appellees further answered by general demurrer No. 1, by special demurrer No. 2, claiming that the appellants had an adequote remedy at law, and by special demurrer No. 3, with subdivisions from A to P inclus-ve, and then by general denial.

"Upon hearing of the demurrers, the court overruled the special demurrer No. 2, and sustained the general demurrer and the special demurrer No. 3, and each paragraph thereof, except as hereinafter stated; and upon appellants declining to amend their petition the same was, by judgment of the court dismissed and final judgment rendered against appellants in favor of appellees, from which judgment appellants prosecute this appeal."

282 The act of the Legislature questioned by the petitions in these cases is here set out in full as follows:

"Railroads—Providing for the Levy, Assessment, and Collection of a Tax on the Gross Receipts of.

H. B. No. 52.) Chapter 141.

"An act imposing a tax upon railroad corporations, the receivers thereof, and other persons, firms and associations of persons, owning, operating, managing or controlling any line of railroad in this State, for the transportation of passengers, freight and baggage, or either, equal to one per cent. of their gross receipts, and providing for the collection and payment thereof; and repealing the existing tax on the gross passenger earnings of railroads.

"SECTION 1. Be it enacted by the Legislature of the State of Texas: Every railroad corporation, or the receiver thereof, and every other person, firm or association of persons, owning, operating, managing or controlling any line of railroad in this State, for the transportation of passengers, freight and baggage, or either, shall pay to the State an annual tax for the year 1905, and for each calendar year thereafter, equal to one per centum of its gross receipts, if such line of railroad lies wholly within the State; and if such line of railroad lies partly within and partly without the State, it shall pay a tax equal to such proportion of the said one per centum of its gross receipts as the length of the portion of such line within the State bears to the whole length of such line; provided, that if satisfactory evidence is submitted to the Comptroller at any time prior to the date fixed in Section 2 of this Act for the payment of the tax herein imposed, that any other proportion more fairly represents the proportion which the gross receipts of any such railroad for any year within this State bears to its total gross receipts, it shall be his duty to levy and collect for such year from
283 such railroad a tax equal to such other proportion of one per centum of its total gross receipts.

"SEC. 2. For the purpose of determining the amount of such tax, the president, vice-president, general manager, treasurer or superintendent of such railroad corporation, or the receiver thereof, or such other person, firm, or association of persons, shall, on or before the first day of October, 1905, and annually thereafter, report to the Comptroller of Public Accounts, under oath, the gross receipts of such line of railroad, from every source whatever, for the year ending on the 30th. day of June last preceding, and shall immediately pay to the State Treasurer the annual tax herein imposed, calculated on the gross receipts so reported. The Comptroller shall have power to require such other reports and affidavits as may in his judgment be necessary to protect the interests of the State, and he shall estimate such tax on the true gross receipts thereby disclosed, and assess and enforce the collection of such tax.

"SEC. 3. Every person required to make reports by this Act, or by the Comptroller of Public Accounts, under the powers herein

given, who shall fail or refuse to make such reports, for a longer period than thirty days, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than one hundred nor more than five hundred dollars, and each day of failure or refusal after said thirty days shall constitute a separate offense.

"SEC. 4. Should such report not be filed with the Comptroller and the annual tax thereon estimated paid to the Treasurer
284 on or before the first day of October of any year, a penalty of ten per centum upon the amount of such tax shall accrue thereon and be added thereto; and in case such report is not made or such tax and the penalty thereon are not paid on or before the first day of November thereafter, or in case of a failure to furnish the additional report or affidavit required by the Comptroller, for a longer period than thirty days, after demand therefor, or in case of failure to pay within thirty days any tax or additional tax assessed by the Comptroller, under this Act, every such railroad corporation or receiver thereof, or other such person, firm or association of persons shall forfeit and pay to the State the sum of two hundred dollars for each day any of said reports or payments may be delayed, after the expiration of such periods respectively.

"SEC. 5. The Attorney General is authorized and required, upon request by the Comptroller, to bring suit in the name of the State, in Travis County, against the proper parties, defendant, to recover all taxes, penalties and forfeitures mentioned in this Act, and venue and jurisdiction of such suits is hereby expressly conferred upon the courts of Travis County. Service of all process issued in such suits may be had upon any officer or agent of such person, firm, association of persons, corporation or receiver thereof, within this State, and such service shall in all respects be held legal and valid.

"SEC. 6. The tax provided for by this Act shall be in addition to all other taxes levied by law, Subdivision 36, of Article 5049, Revised Statutes of 1895, and any existing statute imposing a tax upon the gross passenger earnings of railroads, is hereby
285 repealed.

"SEC. 7. The tax imposed by this Act shall not be levied upon or collected from any person, firm, association, corporation, or receiver owning, operating, managing or controlling any line of railroad in this State after such person, firm, association, corporation or receiver shall have paid the tax upon its intangible assets, as provided for in an Act of the Twenty-ninth Legislature, entitled 'An Act for the taxation of the intangible assets of certain corporations, and to provide for the creation of a State Tax Board for the valuation of such intangible assets, and for the distribution of said valuation for local taxation, and for the assessment of said assets, and the levy and collection of taxes thereon,' while the same may be in force and effect.

"SEC. 8. The depleted condition of the treasury, and the fact that the railroads of the State under existing laws pay far less than their share of the expenses of the State government, creates an emergency within the meaning of the Constitution, and an imperative public necessity that the constitutional rule requiring bills to be read on

three several days be suspended, and that this Act take effect and be in force from and after its passage; and it is so enacted."

286 *Opinion.*

The question that first arises is upon cross assignments urged by the appellees. It is there contended that the court erred in overruling the demurrers and not dismissing these cases because they are practically suits against the State; that the State officers who are made defendants are merely nominal parties, and that no trespass or act of invasion of the property rights of the appellants is threatened, and that these actions are merely resorted to as a convenient way of testing the constitutionality of the law in question. Considered in the light of the facts stated in the bill, the question, while not free from doubt, must be decided in favor of the appellants.

The invalidity of the law which provides for the scheme of taxation is expressly and clearly charged. Its unconstitutional aspects, state and national, are pointed out, and if enforced, it will be at the expense and cost of the complainants. In bringing these cases within the liberal rule that prevails in the United States courts upon this subject, we have had some difficulty in reaching the conclusion that the wrongs charged and threatened were of a nature calculated to injure or disturb the property rights of the plaintiffs. There is no seizure of property provided for by the statute, but the tax, if not voluntarily paid, can only be collected by a judgment, which in a suit brought by the state for that purpose would afford a convenient opportunity to defend against it on the same grounds asserted in the bills filed in these cases. But the principal questions here involved arising upon the Constitution of the United States, we feel the necessity of following the courts of that government in deter-
287 mining the question under consideration; and, when viewed in the light of the decisions of those courts, we think the facts sufficient to show that the suit is not against the State.

Assuming for the purpose of this question the unconstitutionality of the statute on the grounds alleged, the conduct of the officers named, if they should proceed under the law, would, to some extent, embarrass the plaintiffs and impose a burden upon them in furnishing reports and discovering their earnings, and the Comptroller would estimate thereon the tax and assess the same, and the State Treasurer would then make his demand for payment, which is not complied with, the Comptroller would then demand and direct the Attorney General to bring suit to enforce the collection of the tax, and the penalties provided for in the statute. If the law is subject to the objections urged, this conduct would constitute a wrong, not only in law, but in fact. The act of the Comptroller in directing the Attorney General to proceed to suit, would be equivalent to certifying an assessment to counties by a State Auditor, and in such cases, it has been held that injunction would lie against the auditor. Coulter *vs.* Weir, 127 Fed. Rep. 907; Taylor *vs.* L. & N. R. R. Co., 88 Fed. Rep. 350, and Fargo *vs.* Hart, 193 U. S., 490.

A suit against the Auditor General of Pennsylvania to restrain the

assessment of a tax without authority of law, was held not to be a suit against the State. Gregg *vs.* Sanford, 65 Fed. Rep., 151. Further in this connection it is important to be considered that the state officers sought to be enjoined are not merely proceeding by virtue of the general duties imposed upon them as officers by
288 the general laws of the state, but that the conduct and acts complained of arise from a special duty, specifically imposed upon them by the express terms of the statute in question; which authority, it is claimed, they cannot and should not exercise as the representatives of the State, because the law from which they claim to derive their power is void on the ground that it is unconstitutional.

In Smyth *vs.* Ames, 169 U. S., 518, it is said "It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them, as officers of a state, from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of the 11th amendment." Prout *vs.* Starr 188 U. S. 542.

Fittes *vs.* McGhee, 172 U. S., 527, while holding that the facts there considered did not bring that case within the rule, cites many of the cases that support it, and affirms the doctrine in this language: "It is to be observed that neither the Attorney General of Alabama nor the Solicitor of the 11th. Judicial Circuit of the State appears to have been charged by law with any special duty in connection with the act of February 9th, 1895. In support of the contention that the present suit is not one against the State, reference was made by counsel to several cases, among which are Poindexter *vs.* Greenhow, 114 U. S. 270; Allen *vs.* Baltimore & Ohio Ry. Co., 114 U. S., 311; Pennoyer *vs.* McConnaughty, 140 U. S., 1; In Re Taylor, 149 U. S., 164; Reagan *vs.* Farmers Loan & Trust Co., 154 U. S., 362; Scott *vs.* Donald, 165 U. S., 58 and Smyth *vs.* Ames, 169 U. S. 466. Upon examination it will be found that the defendants in each of those cases were officers of the state
289 specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which it was averred they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiffs' rights."

As said before, it not only appears that the state officers sought to be restrained are proceeding under a special authority conferred by the law in question, but that if not prevented their conduct in putting the law into operation might and doubtless would result in a distinct injury and wrong to the plaintiffs. It might create charges against them and burden their property with a liability, and subject them to the infliction of penalties, which if allowed to accumulate would soon amount to more than the tax. And in this connection it is well to note the fact that the correction of an unlawful demand for penalties has afforded ground for the exercise of the power of a court of equity to restrain their enforcement. City of Austin *vs.* Cemetery Association, 87 Tex., 336.

It might be suggested, and possibly the briefs of the State are to that effect, that the district court has no authority to restrain State

officers; and further, that if the taxing act is void, the complainants have an adequate remedy at law. As to the first suggestion, reference is made to the case of Kaufman County *vs.* McGauhey, 21 S. W., 266; and as to the second, we refer to City of Austin *vs.* Cemetery Association, *supra,* and Davis *vs.* Burnett, 77 Tex., 3. Therefore, we are of the opinion that the trial court correctly held that the suits were not against the State, and that there was no error in overruling the demurrers.

We now come to the question as to what is the nature and
290 character of the tax imposed by the enactment. It is contended by the State that it is a tax upon the occupation of the carriers, confined to their state business, for which they are taxed a sum equal to one per cent. of their gross receipts. On the other hand, the complainants assert that the tax is imposed upon the gross receipts, which include those that arise from interstate as well as state traffic; and that if not, but is a tax upon the occupation, it is imposed upon the interstate as well as the state business of the carriers; and for both reasons, it is contended, the tax is void.

The trial court adopted the views of the State, but held in these and other cases tried on the facts, that the tax was based upon the entire gross receipts; and it is shown from the returns and assessments of the Comptroller that the tax of one per cent. is based upon the entire gross receipts, and such basis for taxation acted upon by the Comptroller; and the lower court includes all receipts, state and interstate, that arose from the transportation of freight, passengers and baggage. Some of the railways in question lie partly within and partly without the state, and others wholly within the state; and the Texas & Pacific operates under a charter granted by Congress, and all are engaged in state and interstate traffic, and the receipts upon which the tax is based arose from both sources. It is well to state that it was not contended by the State, nor so held by the trial court, that this is a mere license tax levied by virtue of the police power of the State; but it is an occupation tax, a tax on
the business of railway corporations that pursue their busi-
291 ness within the State, and is intended as a revenue measure. Pullman *vs.* the State, 64 Tex., 274.

A solution of the question depends upon a proper application of the rules of construction; and the least that may be said of the act is that, resorting solely to the language used, its purpose and object is not entirely free from doubt. Such being the case, the legislative intent must be looked to, and when discovered must be applied. All doubts as to the validity of an act must, if its terms admit of it, be resolved in favor of its constitutionality. But we do not understand that this principle was ever intended to control or abrogate in any degree an application of those rules of construction which may be resorted to in order to ascertain the correct meaning and purpose of the law, and when doubtful or uncertain measure and determine its character and nature by the legislative intent upon which it rests. The act in question, which is found on page 337, session laws of 1905, together with the amendment of the franchise act, on pages 21 and 100, and the act imposing taxes on

intangible assets, page 351, and the act levying a tax on gross receipts of certain corporations, page 359, and the act providing for an increase of the ad valorem tax, page 437, were all passed by the Twenty Ninth Legislature, and were doubtless designed and intended as revenue and tax measures to meet and provide in part for an emergency arising from the depleted condition of the state treasury. These laws all relate practically to the same subject; and, being passed at the same session of the Legislature, they may and should be considered together and in connection with each other, where it may become important to determine the meaning and pur-
292 pose of either, and the legislative intent in passing them. Schendell vs. Rogan, 94 Tex., 597.

The Secretary of State, in providing a title for the act in question, has styled it as providing for the levy, assessment and collection of a tax on the gross receipts. The caption of the act imposes a tax upon every railroad corporation, etc., owning, operating, managing or controlling any line of railroad in this State for the transportation of passengers, freight and baggage, or either, equal to one per cent of their gross receipts. The first section, in naming the classes who shall pay the tax, is the same as the caption. The fact that the Secretary of State styled the act a tax on gross receipts does not, it is true, necessarily give it that character, but it is evidence of a construction placed upon it by one of the departments. But however, as an aid to a correct construction, this may be regarded as a matter of as trifling importance as that part of the act that imposes the tax upon railroad corporations or receivers thereof, etc., operating a line of railroad in the state. The selection of these classes who shall pay the tax raises no stronger implication in favor of its being upon the occupation than it does that it was imposed upon the property. Suppose the act had read that any railroad corporation, receiver, manager, etc., owning or operating any railroad, should pay a tax on the property of the railroad of one per cent. of its value; or that said railroad corporation should pay a tax of one per cent. on its income, could it be contended that merely naming the railroad corporation as the person who should pay the tax in these in-
293 stances was conclusive of the fact that the tax was not on the property or income, but upon the occupation or business? One of the recent tax laws referred to affords a striking illustration of this view.

It is needless to state that intangible assets are property; (State of Texas *vs.* Deposit Company, 9 Crt. Rep., 659; Adams Express Co. *vs.* Ohio, 166 U. S., 215) yet in the act of which this is in *pari materia,* in the first section of it is stated that every incorporated railroad, bridge company, telegraph company, express company, and so on, doing business wholly or partly within the state, shall pay a tax on their intangible assets. The tax in that act is clearly upon property, but in creating and levying it, the act merely names the classes of persons that shall pay it, as is the case in the act under consideration. Hence it should be assumed that little weight, if any, should be attached to this circumstance as shedding any light upon the legislative intention.

Now when we come to the main features of the act, its terms are suggestive of a purpose to tax receipts. In the first section the expression "a tax equal to one per cent. on the gross receipts" is used. In the proviso thereto, *and in the second section, the language used* is substantially a tax on gross receipts. In determining the nature of the tax there is very little, if any, difference between the expression "a tax equal to one per cent. of the gross receipts" and "a tax of one per cent. on the gross receipts." It is a mere difference in verbiage without a distinction in fact. If the law should provide that all persons owning property in this state should pay a tax equal to one per cent. of its value, it would not be seriously con-
294 tended that it was not a tax on property. Words are to be used in their common acceptation, and they should not be given a strained construction when the effect will be to create a burden upon the citizen. Nor will an unnatural or unusual interpretation be given them, merely in order to preserve and maintain the validity of a law. The liberal rule that the constitutionality of a law will be maintained if the statute is doubtful requires no such sacrifice. If the tax is upon the gross receipts, it is upon property, and it could not in such case be used as a mere measurement to ascertain the amount of the occupation tax. To the ordinary mind reading the law, in the absence of any words to the effect that it was a tax upon business or occupation, and giving effect to these expressions, "a tax equal to one per cent. of gross receipts," and "a tax on gross receipts" with those provisions requiring the tax payer to return for assessment the gross receipts from all sources, it would readily appear that the law, in substance and effect, was a tax imposed upon the receipts. The suggestion to the contrary finds its basis principally in the case of Maine *vs.* Grand Trunk Railway, 142 U. S., 217, which will be noticed later. That case, however, was based upon a tax statute which contained language distinctly negativing any purpose to tax the receipts, but merely the franchise or privilege of the railway operating its business within the state. Our law contains no expression or anything equivalent thereto indicating it was intended as a tax upon the business or occupation of the carrier. It does use the expression, "Owning, operating, managing or controlling any line of railroad in this state." Of course, this ex-
295 pression would be proper, and would doubtless be employed if the tax were upon the gross receipts.

In all the statutes of this State where the purpose was to tax an occupation or business, and also the statutes of other states that we have examined, with a few exceptions, there have been found some expressions indicating that purpose. It is doubtless true that a person or corporation owning, operating, managing or controlling a railroad in this state may be said to be doing business in the state; but it by no means follows from this that because the Legislature has seen fit to tax such persons, that the intention was to impose a tax upon the business.

The contention is made that section 6 of the act is important to be considered as indicating the legislative intent to impose a tax on the occupation. It is there provided that the tax imposed shall be

in addition to all others provided by law, and repeals the old law that imposed a tax on the gross passenger earnings of railroads. Little if any importance can be given to the fact as an aid in determining the nature and character of the law, that the Legislature declared that it should be in addition to all other laws. It is true that there was in existence an advalorem tax on property which was increased by the last Legislature; and it might be admitted that there was no occasion for any further taxation on property. But however this may be, it is an historical fact that just about the time that the legislative declaration relied on was made, that that body was creating tax schemes of nearly every character, and reaching out after subjects upon which to impose them; and there was apparently from
296 some sources exhibitions of distress because the Legislature had exhausted the subject and reached the limit.

The law repealed relating to tax on gross passenger earnings was an occupation tax, because the statute expressly made it so, and it related to passenger earnings within the state. Section 7 of the statute under consideration acts as a counter-balance to section 6, and is very pursuasive of the idea that the Legislature did not intend to impose a tax upon the occupation or business of the carrier. It is there provided that the "tax imposed by this Act shall not be levied upon or collected from any person, firm or association, corporation or receiver owning, operating, managing or controlling any line of railroad in this State, after such person, firm, association, etc. shall have paid the tax upon its intangible assets, as provided for in the Act of the 29th. Legislature," which is the act to be found on page 351 of the session laws, and provides for the levy, assessment and collection of taxes upon intangible assets. As before stated, a tax upon intangible assets is a tax on property, and there is no good reason, and none has ever been advanced why such property which has a situs within the state should not be taxed. The Intangible Assets Act referred to indicates that it has established not only a present but a permanent scheme of taxation, and it is to this act that the railway companies are referred, the benefits of which they may accept, and which is intended to replace and abrogate what is asserted to be merely a law taxing occupations. If the law was designed as a tax upon occupations, it is difficult to believe that it was intended as a make-shift, which should be replaced by some other law which solely created a tax on prop-
297 erty; and in this connection, going back to what was said concerning the words which indicate a tax on gross receipts, this section, when considered with those expressions, furnishes the most reliable facts upon which to base a construction.

A further pursuit of this subject, when controlled by certain legal principles, will in our opinion, remove all doubt as to the legislative intention, and definitely discover the purpose and object of the law.

1. When a law is not so plain that its own terms furnish its construction, the courts must go beyond and consider the relevant acts in *pari materia*. Schendell *vs.* Rogan, *supra*.

2. The legislative action and reports concerning the law as ap-

pears in its records and journals may be examined. Farmer *vs.* Shaw, 93 Tex., 444; State *vs.* Conner, 86 Tex., 140.

3. And especially the interpretation and meaning given to the law by the Legislature that passed it. Cannon *vs.* Vaughan, 12 Tex., 401; United States *vs.* Freeman, 3 How., 562; Cope *vs.* Cope, 137 U. S., 682.

4. The character and nature of the tax is to be determined, not on the form of the agency through which it is to be collected, but by the subject upon which the burden is cast. State Freight Tax Cases, 15 Wall., 232. And effect is to be given to the substance and not the shadow in determining not only the validity of the act, but its nature and extent. Postal Telegraph Co. *vs.* Adams, 155 U. S., 696.

These principles are applied and method employed merely as means to ascertain the legislative intent, which is in all such cases the primary question of importance, and when ascertained will be read into law, or, in other words, the intent will become the
298 law. Webber *vs.* Rogan, 94 Tex., 68, and Edwards *vs.* Morton, 92 Tex., 153. In this case it is said: "The intention of the Legislature in enacting a law is the law itself and must be enforced when ascertained, although it may not be consistent with the strict letter of the statute. Courts will not follow the letter of the statute when it leads away from the true intent and purpose of the Legislature, and to conclusions inconsistent with the general purpose of the act. Judge Moore properly characterized that kind of construction which disregards the intention and adheres to the letter of an act in the following language: 'If the courts were in all cases to be controlled in their construction of statutes by the mere literal meaning of the words in which they are couched, it might well be admitted that appellant's objection to the evidence was well taken, but such is not the case. To be thus controlled, as has often been held, would be for the courts in a blind effort to refrain from an interference with legislative authority by their failure to apply well established rules of construction, to in fact abrogate their own power and usurp that of the Legislature and cause the law to be held directly the contrary of that which the Legislature had in fact intended to enact. While it is for the Legislature to make the law, it is the duty of the courts to try out the right intendment of statutes upon which they are called to pass, and by their proper construction to ascertain and enforce them according to their true intent; for it is this intent which constitutes and is in fact the law, and not the mere verbiage used, by inadvertence or otherwise, by the Legislature to express its intent, and to follow which would pervert that intent.' Russell *vs.* Farquhar, 55 Tex., 355."
299 Now, what are the facts to which these rules may apply?

That since the decision of the case of the Western Union Telegraph Co. *vs.* the State of Texas, 105 U. S. which reversed the same case decided by the courts of this state in 55 Texas, in most instances, if not all, the laws of this state which seek to impose a tax on the business or occupation of the carrier, and subjects of that class, use the expression "within this state," or words showing

that the tax confined to business within the state. And like expressions are used in what is known as "The Kennedy Bill," law of 1905, page 356. [illegible] of the occupation tax laws that we have examined for a number of years back the Legislature has stated and designated them as occupation tax laws, or have imposed the tax upon the occupation; and in those instances were they have imposed the tax on receipts the law has been designated as an occupation tax. A striking but common illustration of this is the act of April 6th, 1889 page 24. The first article of the act is that there shall be levied and collected from every person, firm, etc., pursuing any of the following named occupations, an annual occupation tax, etc., and this is the statute that levies a tax upon the gross receipts derived from passenger traffic within this state, which is supposed to be repealed by the present act. And this act, so far as carriers are concerned, provided that no county or city should levy an occupation tax against railways. As before stated, the bill we are now considering uses the expression "a tax equal to one per cent. of the gross receipt-." Not much importance can be attached to this fact as indicating that the tax is not on gross receipts, because it is apparent that the Legislature used the expression interchangeably with that of "a tax on gross receipts." The act itself
300 indicates this, but all question is removed by a reference to the Kennedy Bill, which is one of those referred to. That Bill levied a tax upon many corporations, and upon express and sleeping car companies imposes a tax equal to a certain per cent. on their gross receipts; but upon telegraph and telephone companies and others, imposes a tax on their gross receipts. If it was intended that the words, "equal to a certain per cent. of the gross receipts" should have some peculiar significance other than the words "on or upon the gross receipts," it is difficult to find a reason why the Legislature did not use those words in imposing the tax upon telegraph companies and others. This contemporaneous legislation clearly indicates that the Legislature attached no more importance to the words, "equal to" than they gave to the words "on or upon," or intended that either should be given any significance different from the other.

It is shown by the House Journal of the 29th. Legislature, that the original bill of the act in question when originally introduced was "An Act imposing an occupation tax upon persons, firms, companies or corporations owning, operating, managing or controlling any line of railroad in this state for the transportation of passengers and freight, equal to one and one-half per cent. of their gross receipts within this state, and repealing subdivision 42, Article 5049, Revised Statutes of Texas of 1895." The bill was amended by striking out the word "occupation" and the words "within this state," and in this condition was passed. This is very significant, and why it was done could have been only for the purpose of impressing the law with the legislative purpose to emphatically declare that
301 they did not intend to impose an occupation tax upon the operation of railroads. The words which are ordinarily and usually used in the laws imposing occupation taxes in this state.

and which were proper and important to be used in this instance, if this was the object of the law, were deliberately stricken out, and the statute left in a condition which would justify a construction opposed to the purpose of the bill as originally introduced. The Legislature knowing this to be true, it is idle to say that they intended something which they deliberately refused to admit. But it is a more reasonable conclusion that they designedly refused to regard and intend this law as imposing an occupation tax, because of the great and unusual burden it would impose upon the railways (a class of subjects who must perform their business and operate their lines whether willingly or not, with no chance to withdraw) on account of the peculiar provisions of our Constitution, which authorize and empower every county and city within the state to levy and collect a certain per cent. of the corporation tax created by the statute against all persons and corporations who may be engaged in business in such counties and cities. If the tax created was upon the occupation, the sum authorized, if based upon the gross earnings and collected as allowed by the Constitution, would doubtless be far in excess of the sums paid by all the railroads as taxes upon all of their property. Such an unheard of and unusual burden imposed upon an occupation practically carried on for the benefit of the public was what the Legislature doubtless intended to prevent.

It is suggested that only the county and city of the local
302 domicile of the roads would be entitled to tax their occupation. We find no such limitation in the Constitution, nor is there any provision made by the law in question for a distribution of the taxes that may be collected to the several counties and cities through which any of the roads may run. Whatever limitations that might rest upon the home rule doctrine (*People vs.* State Board, 105 Am. St. Reps., 675) in some of the states, it is in full force and vigor in this state; and the provisions of the Constitution of this state in regard to local assessment and collection of taxes, and the right of the counties and municipalities to their proportionate share, has never been authoritatively questioned.

Section 7 of the act allows the railway companies to be relieved of this act when the Intangible Assets Statute goes into effect, and when the roads pay the taxes provided for by that act. Section 12 of the Intangible Assets Act says "that upon the taking effect of this Act, and upon the compliance with the provisions by the individuals, companies, corporations and associations hereby named, and upon the payment of the taxes imposed hereunder, if any are imposed, all laws and parts of laws laying taxes upon the gross receipts of said individuals, companies, corporations and associations shall be, and the same are hereby repealed." This section of the Intangible Assets Bill is to be construed with section 7 of the statute in question, and, unquestionably, relates to the tax created by the law we are now considering. What stronger language could be used indicating a legislative construction.

In Cannon *vs.* Vaughan, 12 Tex., 401, in applying the
303 rule of the construction of statutes, the court says: "Among the most important of these rules are the maxims that the

intention of the Legislature is to — deduced from the whole and every part of a statute when considered and compared together; that the real intention when ascertained will prevail over the literal import of the terms, and that the reason and intent of the Legislature will control the strict letter of the law when the latter would lead to palpable injustice, contradiction and absurdity; that when the words are not explicit, the intention is to be collected from the occasion and necessity of the law, and from the mischief and objects and remedy in view; and the intention is to be presumed according to what is consonant to reason and good discretion. It is another established rule that all acts in *pari materia* are to be taken together as if they were one law, and that if it can be gathered from a subsequent statute in *pari materia* what meaning the Legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. 1 Kent 461; 3 How. 564."

In United States *vs.* Freeman, 3 How., 562, the court says: "The correct rule of interpretation is that if divers statutes relate to the same thing, they ought all to be taken into consideration in considering any one of them; and it is an established rule of law that all acts in *para materia* are to be taken together as if they were one law. If the thing contained in the subsequent statute be within the reason of the former statute, it should be taken to be within the meaning of that statute; and if it can be gathered from the subsequent
304 statute in *pari materia* what meaning the Legislature attached to the words of a former statute, it will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. Wherever any words of a statute are doubtful or obscure, the intention of the Legislature is to be resorted to to find the meaning of the words. A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter."

In Cope *vs.* Cope, 137 U. S. 689, it is said: "The several acts of Congress, dealing as they do with the same subject matter, should be construed not only as expressing the intention of Congress at the dates the several acts were passed, but the later acts should also be regarded as legislative interpretation of the prior ones." Citing several cases.

Both of these acts refer to each other, and are practically a part of one scheme of taxation. The Legislature evidently knew and understood the purpose of both. They called it and construed it to be a tax laid upon gross receipts. They had stricken out the other words that sought to give it a different effect; and knowing well what they intended when that was done, they, when called upon to name the act and characterize the tax it imposed, in keeping with the previous intention and purpose and in accord with the terms of the law, gave it the only name that it was entitled to, unless we read into the law the words deliberately rejected; and impute an intention which is disproved by the record.

It may be contended that it is not presumed that the Legislature intended to pass an unconstitutional law, and that if the verbiage

of the act admits of an interpretation consistent with its
305 validity, it should be followed, exclusive of a resort to outside matters; and that with the aid of this rule the act in question can be maintained upon the authority of the State Tax Gross Receipt Cases, 15 Wall., 284 and Maine *vs.* the Grand Trunk Railway, 142 U. S. 217, and possibly other cases. No one desires to question the rule of law stated, but if we are correct in our views as to the construction of the law as previously expressed, this question becomes abstract. The constitutional rule adverted to was never intended to deny an *injury* into the nature and effect of a law and the intention of its makers; for, otherwise, an application of the rule would be a convenient way of holding all laws constitutional. We repeat that the language of the statute needs assistance in order for a proper interpretation, and this Court cannot close its eyes to its imperfections merely to preserve its life in deference to a presumption as to its validity; nor can the intention be obscured by a play on words, or the discovery of a condition which the law will fit, if construed in one particular way. This condition, as it is claimed, being the necessity for an occupation tax to which, if the law is applied, it would be valid.

It is in support of this contention and that the tax is not upon the receipts, but they are merely used as a measurement to ascertain the amount of the business done and the taxes to be paid, that these cases are cited. In the Gross Receipts Case, the statute of Pennsylvania provided for a tax upon gross receipts of railways. The act did not expressly impose a tax upon business or franchise, but the opinion of the court, in some respects, treats the tax as
306 upon the franchise of the company, but the tax was really on the receipts. And in this respect the case has been treated really as overruled by Fargo *vs.* Michigan, 121 U. S. 240, and Phila. S. S. Co. *vs.* Penn., 122 U. S., 326-338, and in cases by some of the State Courts; and must also be considered as impliedly overruled by other cases, so far as it undertakes to impose a tax upon the receipts that arose from interstate commerce, that is in so far as it imposed a tax directly upon the receipts and not merely upon the franchise.

It is to be noticed that in the Maine case, so much relied on, the Gross Receipts Case was not mentioned, although cited in the briefs of counsel. Maine *vs.* The Grand Trunk Railway construed and applied a statute of Maine which provided that "any corporation, person or association operating a railroad in the state should pay to the state treasurer for the use of the state an annual excise tax for the privilege of exercising its franchise in the state," and then proceeded to estimate such tax for the privilege upon the amount of the gross receipts. The court held that the tax was an excise tax upon the corporation for the privilege of exercising its franchise in the state, and said "it is so declared in the statute which imposes it," and then proceeded to hold that the gross receipts were merely taken as a measurement by which to determine the amount of taxes imposed upon privilege, and expressly mentioned with approval 122 U. S., 326, in the following language: "The case of Philadelphia

Steamship Co. *vs.* Pennsylvania, 122 U. S., 326, in no way conflicts with this decision. That was a case of a tax in terms upon the
307 gross receipts of a steamship company incorporated under the laws of the state, derived from transportation of persons and property between different states, and to and from foreign countries. Such tax was held, without dissent, to be a regulation of interstate and foreign commerce, and therefore invalid. We do not question the correctness of this decision, nor do the views we hold in this case in any way qualify or impair them."

Opposed to the views in the Maine case was a vigorous dissent by Justices Bradley, Harlan, Lamar and Brown, who took the view that the case came within the principles decided in Phila. S. S. Co. *vs.* Penn., *supra;* Pickard *vs.* Pullman Car Co., 117 U. S. 34; Laroup *vs.* Mobile, 127 U. S., 640; Norfolk Ry. Co. *vs.* Penn., 136 U. S., 114; Crutcher *vs.* Kentucky, 140 U. S., 47, and other cases which have held that the interstate receipts or business of a carrier could not be taxed by the state. And this principle has been repeatedly reaffirmed in cases too numerous to mention, many of which are collected in Atlantic Telegraph Co. *vs.* Philadelphia, 190 U. S. 162. The Maine case has been cited with approval in other cases, but only apparently on the ground that it was authority in support of the rule that the states could tax a franchise as property of the carriers which had a local situs or are within the state; or in cases where the unit rule of taxation was up for application; or in that class of cases where the tax was upon the receipts in lieu of all other taxes, which might be a permissible system, if the amount does not exceed what would be the reasonable amount of the tax that could be assessed against the property. This is, to some extent, illustrated in
308 Postal Co. *vs.* Adams, 155 U. S., 696, and Telegraph Co. *vs.* Taggart, 163 U. S., 1, and other cases cited in Atlantic Company *vs.* Philadelphia, where it is said: "This immunity does not prevent a state from imposing ordinary property taxes upon property having a situs within its territory and employed in interstate commerce. And again, the franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, provided at least the franchise is not derived from the United States." Which case then proceeds to cite many cases denying the right of the states to impose any burden upon or regulate interstate commerce, nor to impose burdens upon engaging in or carrying on the business of that commerce.

If the franchise is property and could be taxed there could be no objection to the Maine case, or if construed as imposing a tax on the local business of the carrier, it is unobjectionable; but if it undertakes to impose a tax upon the receipts which arise from the interstate business of the carrier, or to impose a tax upon that business, it most clearly cannot be maintained, unless the tax was intended as a commutation tax; in other words, a tax in lieu of all others. But if we treat the Maine case as an excise tax upon the franchise of a carrier, and that the receipts were employed merely as a measurement to ascertain the amount, and from this undertake to draw the analogy that the tax in question in the case under consideration

was intended as an occupation tax on the local business of the carrier, we meet with an insurmountable difficulty which the court did not encounter in the case referred to. There there was no necessity of reading words into the law in order to determine the legislative will. The intent of that body was manifest from the terms of the act, for it was expressly stated that it was an excise tax, for the privi-
309 lege of exercising its franchise within the state, and the court expressly stated that such was its purpose, and proceeded to give it that effect; and it is apparent that that being the nature of the tax created by the statute, was the ground on which the court undertook to base its decision. This is clear when we read what is said in distinguishing the case from Phila. S. S. Co. *vs.* Penn.; and in view of this case, which is quoted with approval, can it for a moment be imagined that in the Maine case, if the law had omitted, as is the case in the law we are considering, all expressions indicating a purpose to tax the franchise or business, that the court would have held that the tax was on the franchise or business or occupation of the carrier.

The case of Philadelphia S. S. Co. *vs.* Pennsylvania referred to, is much quoted with approval by recent decisions of the Supreme Court of the United States. There, the statute of Pennsylvania was to the effect that "every railroad company, canal company, steamboat company, slack water navigation company, transportation company, street passenger railway, and every other company now or hereafter incorporated by or under any of the laws of the Commonwealth, or now or hereafter incorporated by any other state, and doing business in this commonwealth, and owning, operating or leasing to or from any corporation or company any railroad, canal, slackwater navigation, or street passenger railway or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freight or passengers, and every tele-
graph company incorporated under the laws of this or any
310 other state, and doing business in this commonwealth, and every express company and any palace car and sleeping car company, incorporated or unincorporated, doing business in this commonwealth, shall pay to the State Treasurer for the use of the Commonwealth a tax of 8/10 of one per centum upon the gross receipts of such company for tolls and transportation, telegraph business and express business." It will be observed that the tax construed in this case provided for a tax of a per cent. upon the gross receipts of the company for tolls and transportation. The act under consideration in the statute before us is practically to the same effect, omitting the word "equal," and is to the same effect when we consider the other parts of sections 1 and 2 of the statute. It imposes a tax upon the carrier for the transportation of passengers, freight and baggage a sum of one per cent of the gross receipts, or a sum equal to one per cent. of the gross receipts. Practically, it is a tax in each case upon the gross receipts that arise from transportation; and there is as much, if not more, in the act construed in the Philadelphia-Pennsylvania case indicating a purpose to tax the occupation or privilege of doing business than is in

the act up for construction; yet the court in that case, in a well considered opinion, based upon several authorities cited, held that the statute operated upon interstate commerce and that the tax imposed was upon gross receipts. But to make this plain it will be observed that when we parallel the statutes there is practically no difference between them. Both statutes say that the railway corporations, owners, etc., shall pay a tax of a certain per cent. of their
311 gross receipts. The Pennsylvania act uses the expression "for doing business within the commonwealth." The act we have does not contain an expression "for doing buiness within the state." The act here has the additional words "equal to one per cent. of the gross receipts." Neither statute uses the expression "occupation or franchise," nor does it use any similar words indicating that the tax was imposed upon the business. Therefore, we find that the only difference, which is slight, between the two statutes is that the Pennsylvania law expressly says "for doing business within the commonwealth," and the Texas statute has in it the words "on the gross receipts," "a sum equal to one per cent of the gross receipts." If these last additional words had been in the Pennsylvania statute, it is idle to say that they would have made any difference in the ruling of the court in the decision of the case. That court had before it the Gross Receipts Tax Case, and if there is any force in the suggestion that that case furnished a rule by which the law, in deference to the rule that it will be given an application consistent with its constitutionality, that court would have noticed it. It never occurred to that court that the law would admit of a construction which would give it the effect of a tax on franchise or occupation, and that court never for a moment assumed that in order to uphold the tax, they could read into the law or supply words indicating that purpose. The court in the Maine case when it approved this case and distinguished it, clearly had in mind this difference between the two laws, and that the Pennsylvania law was correctly applied, and could not be construed as imposing a tax on occupation or franchise.

It would afford a very convenient means by which to evade
312 the commerce clause of the Constitution and bring within reach of the states subjects of taxation which hitherto had been under the protection of Congress, if the states by a mere system of verbiage could disguise the real effect and purpose of the law. If this could be permitted the state would, when the law was questioned, doubtless claim that when we taxed the carriers a sum equal to one per cent. of all of the commerce brought into and carried out of the state, we had no thought of violating the law and exceeding our jurisdiction, for it was not the commerce we were undertaking to tax, but the railway companies, the carriers that transported it, in a sum equal to the value of that commerce.

Interstate commerce is as far removed from the burden of state taxation as property or receipts arising from property beyond the jurisdiction of the state. If the legislature would impose upon corporations and persons within the state a tax upon their property hav-

ing a situs within another state, such tax would clearly be unauthorized. Louisville Ferry Co. *vs.* Kentucky, 188 U. S., 396; Delaware R. R. Co. *vs.* Penn. 198 U. S., 353; Fargo *vs.* Hart, 193 U. S., 499. Yet the most sanguine advocate of the far reaching power of the authority of the state would never for a moment seriously contend that an imposition upon such persons and corporations in the state of a tax in a sum equal to a per cent. of the value of the property without the state, or equal to a per cent. of the revenues arising from it, which have never been brought within the state would be valid. Nothing lawful to such a scheme would be added by the use of the words "a sum equal to a per cent."; and the use of these
313 words does not, in the law in question, assume such a magnitude as to overshadow the legislative intent. And they cannot indirectly be given an effect to accomplish something which the law expressly prohibits. It is the substance of the law, and not the shadow, that the courts observe. The effect of the act and the subject on which the burden is laid will determine its character. Stockard *vs.* Morgan, 185 U. S. 27. In Pollock *vs.* Farmers Loan & Trust Co., 157 U. S., 580, it is said:

"The real question is, is there any basis upon which to rest the contention that the real estate belongs to one of two great classes of taxes, and the rent or income is the incident of its ownership belongs to the other? we are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income. This law taxes the income received from land and the growth or produce of the land. Mr. Justice Paterson observes, in Hylton *vs.* United States, 3 U. S. 3 Dall, 171, "land, independently of its produce, is of no value;" and certainly had no thought that direct taxes were confined to unproductive land.

"If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has been established by repeated decisions of this court. Thus,
314 in Brown *vs.* Maryland, 25 U. S., 12 Wheat, 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void. And Chief Justice Marshall said: 'It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale, is a tax on the article itself.'

"In Weston *vs.* Charleston, 27 U. S., 2 Pet., 449, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the city of Charleston involved in that case was exceedingly obscure;

but the opinions of Mr. Justice Thompson and Mr. Justice Johnson, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the court, Chief Justice Marshall delivering the opinion, overruled that contention.

"So in Dobbins *vs.* Erie County Comrs. 41 U. S., 16 Pet. 435, it was decided that the income from an official position could not be taxed, if the office itself was exempt.

"In Almy *vs.* California, 65 U. S., 24 How., 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; In Northern Cent. R. Co. *vs.* Jackson 74 U. S., 7 Wall., 262, that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon the security; and in Cook *vs.* Pennsylvania, 97 U. S., 566, that a tax upon the amount
315 of sales of goods made by an auctioneer was a tax upon the goods sold.

"In Philadelphia & S. M. S. Co. *vs.* Pennsylvania, 122 U. S., 326, and Leloup *vs.* Mobile, 127 U. S., 640 it was held that a tax on income received from interstate commerce was a tax upon the commerce itself, and therefore unauthorized. And so, although it is thoroughly settled that where by way of duties laid on the transportation of the subjects of interstate commerce, and on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained, yet the property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or domestic commerce, may be taxed, and when the tax is substantially a mere tax on property, and not one imposed on the privilege of doing interstate commerce, the exaction may be sustained. 'The substance and not the shadow determines the validity of the exercise of the power.' Postal Telegraph Co. *vs.* Adams, ante, p. 311."

Viewing the act from every standpoint, we are of the opinion that it is a tax on the gross receipts of the railway companies, and not an occupation tax. That the state has no power to impose a tax upon the interstate receipts is too well settled to admit of discussion. No state has the right or power to levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation; or on the occupation or business of carrying it on, and
316 the reason is that such taxation is a burden on commerce and amounts to a regulation of it, which belongs solely to Congress. Leloup *vs.* Port of Mobile, 127 U. S., 645; Fargo *vs.* Michigan, 121, U. S., 230; State Freight Tax Cases, 15 Wall, 232; Western Union Telegraph Co. *vs.* Texas, 105 U. S., 460; Pickard *vs.* Pullman Co., 117 U. S., 34; Philadelphia S. S. Co. *vs.* Penn., 122 U. S., 326; Rattmer *vs.* Western Union Tel. Co. 127 U. S., 411; Postal Cable Co. *vs.* Adams, 155 U. S., 688; Western Union Tel. Co. *vs.* Alabama, 132 U. S., 477; Western Union Tel. Co. *vs.* Penn., 128 U. S., 39; Allen *vs.* Pullman Co., 191 U. S., 171; Caldwell *vs.* North

Carolina, 187 U. S., 622; Brennan *vs.* Titusville, 153 U. S., 32; Norfolk & W. Ry. Co. *vs.* Simms, 191 U. S., 441; Crutcher *vs.* Kentucky, 141 U. S., 47; Stockard *vs.* Morgan, 185 U. S., 37; Atlantic & Pacific Telegraph Co. *vs.* Phila., 190 U. S., 160; Miller *vs.* Goodman, 91 Tex., 43; Delaware & Hudson Canal Co. *vs.* Penn., 1 L. R. A./, 232; Northern Pacific R. R. Co. *vs.* Raymond, 1 L. R. A., 732, and Vermont & Canada Ry. Co. *vs.* Vermont Northern Ry. Co., 10 L. R. A., 562.

And the principle which is affirmed by some of the cases cited *it* is also well settled that because the law that creates the tax imposes it also upon the state receipts, that fact can give no validity to the burden upon the interstate commerce. The principle announced by these cases is indicated by what is said by the court in Fargo *vs.* Michigan: "The proposition that the states can, by way of a tax upon business transacted within their limits, or upon the franchise of corporations which they had chartered, regulate such business or the affairs of such corporation, has often been set up as a defense to
317 the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration; but where the business so taxed is commerce itself and is commerce among the states, or with foreign nations, the constitutional provision cannot thereby be evaded, nor can the states by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them which is itself interstate commerce, acquire the right to regulate that commerce, either by taxation or any other way." This case, as well as Phila. S. S. Co. *vs.* Penn., *supra*, construed statutes which levied a tax held to be substantially upon the gross receipts; and when we strip the law of this state that we are now considering of the supposed characteristics sought to be given it by the state, and consider it in the language in which it is actually framed, with no words indicating a purpose to tax the franchise or occupation, the latter case, if not both, are in point, and if there is a distinction or a difference between these cases and the present one we are unable to discover it. In Philadelphia *vs.* Pennsylvania, the court said:

"If then the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the state, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the State cannot tax the transportation, may it nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: 'We will not tax you for the transportation
318 you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning.

"This court did not so reason in the case of Brown *vs.* Maryland, 25 U. S. 12 Wheat, 419. The state of Maryland required all importers of foreign goods, and other persons selling the same by whole-

sale, bale or package, to take out a license and pay $50 therefor, subject to a penalty and forfeiture for selling without such license. It was contended on the part of the state that this was a mere tax on the occupation of selling foreign goods, affecting only the person and not the importation of the goods themselves, or the occupation of importing them. Chief Justice Marshall met this objection by showing that the attempt to regulate the sale of imported goods was as much in conflict with the power of Congress to regulate commerce as a regulation of their importation itself would be. 'If this power', said he (referring to the power of Congress) 'reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, where given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported. Sale is the object of importation and is an essential ingredient of that intercourse, of which import-
319 ation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell * * * Any penalty inflicted on the importer for selling the article in his character of importer, must be in opposition to the act of Congress which authorizes importation. * * * The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce.'

"The application of this reasoning to the case in hand is obvious. Of what use would it be to the ship owner, in carrying on interstate and foreign commerce, to have the right of transporting persons and goods free from state interference if he had not the equal right to charge for such transportation without such interference? The very object of his engaging in transportation is to receive pay for it. If the regulation of the transportation belongs to the power of Congress to regulate commerce, the regulation of fares and freights receivable for such transportation must equally belong to that power, and any burdens imposed by the state on such receipts must be in conflict with it. To apply the language of Chief Justice Marshall, fares and freights for transportation in carrying on interstate or foreign commerce are as much essential ingredients of that commerce as transportation itself. * * *

320 "It is hardly within the scope of the present discussion to refer to the disasterous effects to which the power to tax interstate or foreign commerce may lead. If the power exists in the state at all, it has no limit but the discretion of the state, and might be exercised in such manner as to drive away that commerce or to

load it with an intolerable burden, seriously affecting the business and property of other states interested in it; and if those states, by way of retaliation, or otherwise, should impose like restrictions, the utmost confusion would prevail in our commercial affairs. In view of such a state of things which actually existed under the Confederation, Chief Justice Marshall, in the case before referred to, said: 'Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of Nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states. To construe the power so as to impair its efficacy would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.' Brown *vs.* Maryland, 25 U. S. 12 Wheat., 446.

321 "Nothing can be added to the force of these words."

These cases suggest the principle that runs through all of the others that are cited.

It might be suggested that the tax is upon the franchise or income of the carriers. What we have said in construing the tax under the decision of Phila. S. S. Co. *vs.* Penn., and similar cases, practically disposes of this question. The law indicates no purpose to impose a tax upon the franchise, for there was and is now other laws upon that subject; but the statute, as before said, would no more admit of such a construction than it would that the tax was intended to bear upon the occupation. The suggestions that arise from State *vs.* Austin & Northwestern R. R. Co., 94 Tex., 532, are opposed to the idea that any validity can be given to this statute as a franchise tax. Furthermore, the franchise, in a sense, may be regarded as property (Gulf &c. R. R. Co. *vs.* Hewes, 183 U. S., 66); and in the sense that it is not property, there are statutes with reference to its taxation. If the franchise is property and can be distinctly taxed as such, the method resorted to here is not in compliance with the requirements of the Constitution, which question will be noticed later.

As to the tax being one upon the income, we are of the opinion that such was not the purpose of the law. It does not undertake to tax all of the income that the railway company might receive from the management of its properties, and from other sources of revenue which it might own or control, but merely provides for a tax on the gross receipts arising from the transportation of passengers, freight and baggage from every source. This, it is true, might be

322 regarded as the principal business of a railway company; but there are few, if any, roads but what reap an income and revenue from other sources. Many of them own valuable terminal facilities, which for a compensation is used by other railway com-

panies; and many of them, and most of them, doubtless, own other property which affords some source of revenue, and which evidently, is not intended to be embraced within the meaning of this statute.

The trial court in the disposition of the fact cases in the court below correctly, in our opinion, construed the law as merely applying the receipts arising from the transportation of freight, passengers and baggage. If the Legislature had intended this as merely an income tax, it would have imposed a tax upon the incomes from all sources, and not merely the receipts. The tax upon the income would be a direct tax upon property. Pollock *vs.* Farmers' Trust Company, 157 U. S., 637.

In Vermont & Canada Ry. Co. *vs.* Vermont Cent. Ry. Co., 10 L. R. A., 566, speaking of a similar tax, it is said: "It is in terms, a tax upon the earnings of railroad rates by mile; it is not a tax upon the company which operates a railroad, nor upon the income received by such company, but upon the fares and freights which come from the operation of a particular road." But upon this subject, and also as to the suggestion of the possibility of its being a franchise tax, we call attention to the language of the court in Phila. S. S. Co. *vs.* Penn., as follows:

"The second ground on which the decision referred to was based was that the tax was upon the franchise of the corporation granted to it by the state. We do not think that this can be affirmed
323 in the present case. It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act it was laid equally on the corporations of other states doing business in Pennsylvania. If intended as a tax on the franchise of doing business, which in this case is the business of transportation in carrying on interstate and foreign commerce, it would clearly be unconstitutional. It was held by this court in the case of Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196, that interstate commerce carried on by corporations is entitled to the same protection against state exactions which is given to such commerce when carried on by individuals. * * *

"There is another point, however, which may properly deserve some attention. Can the tax in this case be regarded as an income tax? And if it can, does that make any difference as to its constitutionality? We do not think that it can properly be regarded as an income tax. It is not a general tax on the incomes of all the inhabitants of the State, but a special tax on transportation companies. Conceding, however, that an income tax may be imposed on certain classes of the community, distinguished by the character of their occupations, this is not an income tax on the class to which it refers, but a tax on their receipts for transportation only. Many of the companies included in it may, and undoubtedly do, have incomes from other sources, such as rent — houses, wharves, stores and water power, and interest on moneyed investments. As a tax on transportation we have already seen, from the quotations from the State Freight Tax Case, that it cannot be supported where that
324 transportation is an ingredient of interstate or foreign commerce, even though the law imposing the tax be expressed

in such general terms as to include receipts from transportation which are properly taxable. It is unnecessary, therefore, to discuss the question which would arise if the tax were properly a tax on income. It is clearly not such, but a tax on transportation only.

"The corporate franchise, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state; but in imposing such taxes, care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal Government."

But, however, if viewed as an income tax it cannot be maintained. The law that imposes it would be class legislation and lacking in equality in the imposition of its burdens. In Parker *vs.* North British Insurance Co., 42 La. Ann., 428, 7 So. Rep., 599, in speaking of the equality clause, it is said:

"Then the question simply stated is, whether a property tax levied on the gross receipts of a limited and particular class of persons, and not levied upon the gross receipts of any other class, is valid. The plain constitutional mandate that all property shall be taxed in proportion to its value would seem peremptorily to settle the question. If gross receipts be property subject to taxation, the gross receipts of all or none, must be taxed. It is vain to call gross receipts capital. They are not capital or capital stock, and no legislative declaration can make them so. The only class of taxes under which this can possibly fall is that of an income tax. It is unnecessary for us to decide whether or not under the Constitution,
325 the Legislature has the power to levy an income tax. It suffices to say that if the Legislature had such power, it would be an indispensable condition of its exercise that a tax should embrace the income of all persons not exempted; and whatever power of classification the Legislature might possess as to the subject matter of taxation, that power could, under no pretext be stretched so as to embrace the right to single out a particular class of taxpayers, and to require them to pay such a tax, while exempting all others. This is what the Legislature has attempted to do in this instance, and we are bound to hold that it cannot be constitutionally done."

It is needless to cite the provisions of the Constitution to which this language is applicable. If the law could be held valid in any sense as imposing a tax upon franchises, when classed as property, or upon the gross receipts or income, it does not follow the method prescribed by the Constitution with reference to the assessment and collection of taxes on property. As said before, in some of the states taxes may be imposed, and a method of assessment and collection provided for under a scheme in vesting that power in state officers, or a state commission created for that purpose; but the provisions of the Constitution of this state, which is unnecessary to repeat, provide for a local assessment and collection, which the statute in question ignores.

We now come to the question as to what character and the extent of the receipts is embraced in the statute. It uses the expression, "gross receipts from all sources whatsoever." That, we undertake

to say, means that which arises from the transportation of passengers, freight and baggage; and must, in the construction
326 that must be given to the language, be held to include the gross receipts that arise from interstate commerce, as well as from local traffic. In the case of Western Union Telegraph Co. *vs.* Alabama, 80 Ala. 273, and the same case in 132 U. S., 474, in construing the expression "on the gross amount of receipts by any and every telegraph, telephone or electric light and express company, derived from the business done by it in this state, at the rate of two dollars on the $100," it was held to include interstate, as well as intrastate messages; and also that the tax was levied on both the state and interstate occupation.

Substantially the same rule was made in Laloup *vs.* Mobile, and Crutcher *vs.* Kentucky, *supra,* and Asher *vs.* Texas, 128 U. S., 129. which imposed a drummer's tax on every commercial traveler; and it was there held that this was applicable to drummers for merchants doing business in other states; and the same effect is to be given to Phila. S. S. Co. *vs.* Penn., *supra.*

In Allen *vs.* Pullman Co., 191 U. S., 171, the act in question contained the expression "doing business in the state." The court held that that did not limit its terms to state occupation. The law imposed a tax on each sleeping car of $5 per annum. The court said. "The statute now under consideration requires payment of the sum exacted for the privilege of doing any business, when the principal thing to be done is interstate traffic. We are not at liberty to read into the statute terms not found therein or necessarily implied, with a view of limiting the tax to local business, which the Legislature in the terms of the act, imposed upon the entire business of the company. We are of the opinion that the taxes exacted
327 under the act of 1887 are void, as an attempt by the state to impose a burden upon interstate commerce.

In Western Union Tel. Co. *vs.* the State, 55 Texas., 314; the act which was up for construction provided for the levy of an occupation tax upon every chartered telegraph company doing business within the state, that there should be collected one cent for every full rate message, and one-half that for every message less than a full rate message. The court construed the act to apply to both state and interstate messages. This case was carried to the Supreme Court of the United States, and in 105 U. S., was reversed and remanded. The court held that so much of the act as related to interstate messages was void, but could be enforced as to the messages wholly within the state. The case upon its return to the Supreme Court of this State was decided in 62 Tex., and after mature deliberation the court reached the conclusion that the statute was not divisible.

If it were possible to construe the law as imposing an occupation tax these decisions would also apply, for if such was its nature the statute does not undertake to separate the state and the interstate business, but would relate to the occupation of the carrier in its entirety. Therefore, if it could be considered as creating an occupation tax, it would be necessary to hold it divisible, and separate the state from the interstate business in order to give it effect. If it

could be considered that the statute should be construed as affecting merely gross receipts that arise from local traffic, or if the burden was imposed upon the local business or occupation of the roads, the law affords no means by which these facts may be determined. It furnishes no measure for its divisibility, and to give it such
328 an effect we would practically have to change the law in order to accord with such views, and give it an effect and construction different, evidently, than was intended by the Legislature.

In Baldwin *vs.* Franks, 120 U. S., 678, the court after admitting the rule that where a statute may be in part constitutional and in part unconstitutional, under some circumstances they may be separated, and the unconstitutional rejected; but it said "to give effect to this rule, however, the parts which are unconstitutional and the parts which are constitutional must be capable of separation, so that each may be read by itself. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided is not enough."

In Trade Mark cases, 100 U. S., 82, and Virginia Bond Cases, 104 U. S., 269-305, it is remarked by the court that "if we should in the case before us undertake to make, by judicial construction, a law which Congress did not make, it is quite probable that we would do what, if the matter were now before that body, it would be unwilling to do."

In Poindexter *vs.* Greenhow, 114 U. S., 270, it is said: "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional and another be declared inoperative and void because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to say and to declare that the intention of the Legislature was that the part pronounced valid should be enforcible, even though the other part should fail. To hold
329 otherwise would be to substitute for the law intended by the Legislature, one they may never have been willing by itself to enact."

In Springs *vs.* Thompson, 118 U. S., 90, it is again said: "The insuperable difficulty of an application of that principle to the present instance is that by rejecting the exceptions intended by the Legislature of Georgia, the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation beyond the Legislative intent, and beyond what anyone can say it would have enacted, in view of the illegality of the exceptions."

In Coats *vs.* Campbell, 37 Minn., 498, it is in effect held that where the purpose of a statute which provides for taxation is partly public and partly private, and the amount to be raised for each is not distinguished, the entire act is void.

In Webster *vs.* Bell, 68 Fed. Rep., 184, it is said "But in the imposition of such a tax the interstate business must be discriminated from the intra-state business, or it must be made capable of such discrimination, so that it may clearly appear that the intra-state business alone is taxed." Citing authorities, and then proceeds to hold that the ordinance in question did not undertake to discrimi-

nate or within itself provide any method by which this could be done. Therefore, the law was void.

Western Union Tel. Co. *vs.* State of Texas, 62 Tex., 630, construed the act of the Legislature which was passed upon in the 55th Texas, which has heretofore been referred to as imposing taxes upon the number of messages sent in the state and into and out of the state.

As before stated, the Supreme Court of the United States in
330 reversing the case, intimated that the law might be valid when applied solely to messages within the state. And in the 62nd. Texas, the court, with that decision before it, proceeded to pass upon the question and to determine whether the statute was divisible; or, in other words, whether the state messages could be separated from the interstate messages. In a well considered opinion it was held that the statute was entire, and that the law did not admit of a construction that would distinguish either class of messages from the other, that to so hold would practically create and give an effect to the law different, doubtless, from what was intended by the Legislature; and the statute, being in this condition, the entire act must fail on account of the invalidity of that part that included interstate messages. This case has been cited with approval by the present Supreme Court in the recent case of Kimbrough *vs.* Bartnett, 55 S. W., 123, and also cited with approval by the Supreme Court of Missouri in State *vs.* Hamey, 65 S. W., 949.

The decision in Western Union Tel. Co. *vs.* The State of Texas is the latest of this state that authoritatively and directly applies to a tax statute of the character we are considering, and there is nothing more suggestive in the terms of this statute that would authorize a separation and division than there was in the statute construed in the case referred to. Therefore, we are of the opinion that the entire act is void.

The judgments in each of these cases will be reversed and here rendered to the effect that the appellees, as named, be respectively enjoined and restrained in accordance with the prayers contained in the petitions.

Reversed and Rendered.

FISHER,
Chief Justice.

Filed March 21, 1906.

331 (Endorsed:) No. 3749. G. H. & S. A. Ry. Co. *vs.* R. V. Davidson *et al.* Appeal from Travis County. Opinion Filed in Court of Civil Appeals 3rd. Supreme Judicial District, Austin, Texas, Mar. 21, 1906. R. H. Connerly, Clerk. Fisher, Chief Justice. With App. No. 5106 filed in Supreme Court, May 26, 1906. F. T. Connerly, Clerk.

No. 3882.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY CO. ET AL.
vs.
THE STATE OF TEXAS.

Appeal from Travis County.

Opinion.

Filed March 21, 1906.

This is a suit by the State against the Galveson, Harrisburg & San Antonio Railway Company, the New York, Texas & Mexican Railway Company, the Gulf, Western Texas & Pacific Railway Company, and the Galveston, Houston & Northern Railway Company, to recover under the act of the Legislature discussed and construed by this Court in cause No. 3749, G., H. & S. A. Railway Co. *vs.* R. V. Davidson *et al.*, for the taxes and penalties mentioned in the act. The trial court rendered judgment in favor of the State based upon the gross receipts arising from the transportation of freight, passengers and baggage in a sum equal to 169/365 of one per centum of the total gross receipts for the year ending June 30, 1905.

The assessment of the Comptroller upon which the judgment was based is as follows:

1. That the Galveston, Harrisburg & San Antonio Rail-
332 way Company owns, operates and manages a railroad wholly within the State, that the total receipts from all sources, for the year ending June 30th, 1905 was $7,472,458.47, upon which was calculated, estimated and assessed taxes in the sum of $74,-724.58, being an amount equal to one per centum of the gross receipts.

2. That the New York, Texas & Mexican Railway Company owns and operates a line of road wholly within the State; that its total gross receipts from all sources for the year ending June 30th, 1905 were $509,458.17, upon which was calculated, estimated and assessed a tax in the sum of $5094.58, being equal to one per centum of the gross receipts.

3. The Gulf, Western Texas & Pacific Railway Company owns and operates a line of road wholly within the State; that its total gross receipts from all sources for the year ending June 30th, 1905, were $155,511.01, on which was calculated, estimated and assessed the sum of $1,555.11, a tax being equal to one per centum of the gross receipts.

4. The Galveston, Houston & Northern Railway Company owns and operates and controls a line of road wholly within the State, and its total gross receipts from all sources whatsoever for the year ending June 30th, 1905 were $1,248,117.48, upon which was calculated, estimated and assessed the sum of $12,481.17, a tax equal to one per centum of the gross receipts.

The taxes are based upon the gross receipts that arose from state and interstate transportation of freight, passengers and baggage.

There are some other questions of fact which might be stated, but which it is unnecessary for us to make any finding upon, in
333 view of the disposition that we make of this case, which is controlled by the conclusions reached and the judgment rendered in cause No. 3749, heretofore referred to.

In the briefs of the appellants there are assignments of error complaining of the action of the trial court in refusing to sustain general and special demurrers which go to the validity of the statute, as pointed out in the opinion in the case referred to. Without further discussion of the questions there passed upon, we hold that these assignments are well taken, and that the general demurrers and the special demurrers raising the question passed upon should have been sustained; and, in view of the invalidity of the statute, as construed and determined by this Court, it appears that no amendment can save the case of the State. Therefore the judgment is here rendered that the State take nothing by its suit, and that the appellants go hence with their costs.

Reversed and Rendered.

FISHER,
Chief Justice.

Filed March 21, 1906.

334 (Endorsed:) No. 3882. G. H. & S. A. Ry. Co. *et al., vs.* The State of Texas. Appeal from Travis County. Opinion Filed in Court of Civil Appeals 3rd. Supreme Judicial District, Austin, Texas, March 21, 1906. R. H. Connerly, Clerk. Reversed and rendered. Fisher, Chief Justice. Filed in Supreme Court May 26, 1906. F. T. Connerly, Clerk.

Judgment of Court of Civil Appeals.

March 21, 1906.

No. 3882.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY CO. ET AL.
vs.
THE STATE OF TEXAS.

Appeal from District Court of Travis County.

Opinion by Chief Justice FISHER:

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the court that there was error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the court below be reversed and this court now proceed*ing* to render such judgment as should have been rendered by the court below; it is therefore further con-

sidered, adjudged and ordered that the appellee, The State of Texas, take nothing by its suit against the appellants, The Galveston, Harrisburg & San Antonio Railway Company, The Galveston, Houston & Northern Railway Company, the New York, Texas & Mexican Railway Company and the Gulf, Western Texas & Pacific Railway Company, but that they go hence without day and do have and recover of and from said appellee, The State of Texas, all costs in this behalf expended, both in this court and in the court below,
335 and that this decision be certified below for observance.

Motion of Appellee for Rehearing.

Filed April 4, 1906.

In the Court of Civil Appeals of Texas, Third Supreme Judicial District.

No. 3882.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL., Appellants,

vs.

THE STATE OF TEXAS, Appellee.

Motion of Appellee for Rehearing.

Now in the above styled and numbered cause comes the State of Texas, Appellee, by her Attorney General, and moves the court to grant the appellee a re-hearing in this cause, and to set aside its decisions and judgment heretofore rendered in this cause on March 21st, 1906, and to reverse the judgment of the trial court in this cause, and to here render judgment in favor of appellee in all respects as prayed for by appellee, as plaintiff, in the original petition in this cause; and in support of this motion appellee respectfully shows to the court—

(1.) This court erred in finding and holding that the tax prescribed by Chapter 141 of the Acts of the Twenty-ninth Legislature of Texas is not an occupation tax; it apearing from the Act itself and from every legal source of information whatsoever that the same is an occupation tax, and that in passing said Act the Legisla-
336 ture exercised a power which was not in contravention of any provision of the Constitution of Texas, or of the Constitution of the United States.

(2.) This court erred in holding that Chapter 141 of the Acts of the Twenty-ninth Legislature of Texas was not a constitutional Act, and was null and void; it appearing from the caption and from the body thereof, and from a true and legal construction of the terms and provisions of said Act, that the same required appellants to pay an occupation tax to the State of Texas, and that the amount of such tax was to be determined by a legal and constitutional method plainly set forth in said Act.

(3.) This court erred in finding and holding that the tax prescribed by said Act is a tax upon the gross receipts of the appellants, respectively, and is therefore obnoxious to the commerce clause of the Constitution of the United States; it appearing from said Act that the tax is levied upon the corporation and not upon its gross receipts, and that said tax is defined by said Act as being and is in fact one *equal to a given per centum of the gross receipts of appellants*, respectively, and not *on* such gross receipts, and that such gross receipts are not mentioned or referred to in the Act except as a basis for the calculation of the amount of the tax; and it further appearing that such tax is valid and constitutional, and not obnoxious to any provisions of the Constitution of Texas, or of the Constitution of the United States.

(4.) This court erred in finding and holding that the tax prescribed by Chapter 141 of the Acts of the Twenty-ninth Legislature of Texas, when applied to appellant, constitutes an interfer-
337 ence with interstate commerce, and is for that reason void under the provisions of paragraph 4, Section 3, Article 1, of the Constitution of the United States, commonly known as the "Commerce Clause."

(5.) This court erred in finding and holding that the tax under consideration in this cause is for any reason invalid under the Constitution of the State of Texas.

(6.) This court erred in not sustaining the validity and constitutionality of the tax in question, under the provisions of Section 17 of Article VIII of the Constitution of Texas, which reads as follows, viz:

"The specification of the objects and subjects of taxation shall not deprive the Legislature of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this Constitution."

(7.) This court erred in finding and holding that the tax under consideration in this cause is for any reason invalid under the Constitution of the United States.

(8.) This court erred in finding and holding that the Act complained of by appellants is not free from doubt upon its face, and that the court is therefore authorized to look to other sources in order to determine the true intent and meaning of the Act in controversy; the said Act being set out in full and being made a part of appellee's petition in this cause, and it appearing upon the face of said Act that its meaning is clear and unmistakable, and that it levies an occupation tax and not an *advalorem* or property tax.

338 (9.) This court erred in looking to or considering for any purpose the act of the Secretary of State whereby he ascribed or gave to the Act in question a title or name, designating the same as "Railroads—Providing for the Levy, Assessment and Collection of a Tax on the Gross Receipts of"; such act upon the part of the Secretary of State being merely a clerical act, and not being required by law, and not being the construction of said Act by one of the executive departments of government, under the well

known rules and principles governing and regulating such acts of such executive officers.

(10.) This court erred in looking to or considering for any purpose the address of the Speaker of the House of Representatives at the close of the First Called Session of the Twenty-ninth Legislature of Texas, and in construing said address as declaring the tax in question as "levying taxes upon the gross receipts of railroads, telephone, telegraph, express and other companies"; such an address not being a permissible source from which to derive a construction of the Act in question; Yet, if it is desired to peruse said address for information, generally, as to the history of our times and of the Twenty-ninth Legislature, then, instead of the Speaker considering the same an *advalorem* tax, he expressly stated that the same was *supplemental* to a property tax.

(11.) This court erred in construing the opinion delivered by Mr. Chief Justice Gaines of the Supreme Court of Texas, in the case of Brady *v.* Brooks, 14 Texas Court Reporter, 163, as being a construction by that court of the Act levying the tax in controversy in this cause; it being manifest from said opinion and from
339 the facts involved in the cause in which that opinion was rendered, that the Supreme Court of Texas had no occasion to construe and did not in fact construe said Act in any respect, except to determine what officer should bring suits thereunder; and it being further manifest that in writing said opinion the Chief Justice did not have in mind any question as to the constitutionality of such tax, and that his reference to the Act was merely for identification thereof.

(12.) This court erred in holding, as set forth in the written opinion filed by Mr. Justice Key, that the tax in question is a property tax; it appearing from the Act that said tax is an occupation tax.

(13.) This court erred in holding, as set forth in the written opinion of Mr. Justice Key, that the tax in question is obnoxious to the provisions of, and contravenes the second section of Article VIII of the Constitution of Texas, which declares that "all taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax"; it appearing from said Act that the tax therein imposed upon appellants is an occupation tax and that the same is equal and uniform upon the same class of subjects within the limits of the authority levying the tax.

(14.) This court erred in finding and holding that appellee, as plaintiff, was not entitled to recover of and from appellants, as defendants, respectively, any tax whatever based upon receipts derived from any source whatever, other than receipts from transportation of passengers, freight and baggage, or either, including mail and express matter.

340 (15.) This court erred in not rendering judgment in favor of appellee, as plaintiff, against appellant, as defendant, for taxes based, estimated and calculated upon the entire gross receipts of appellants, respectively, from every source whatever for the year ending on the 30th day of June, 1905, as reported by defendants,

respectively to the Comptroller of Public Accounts, including receipts as follows:

From Car Service.

Galveston, Harrisburg & San Antonio Ry. Co.....	$293,792.73
New York, Texas & Mexican Railway Company....	21,626.76
Gulf, Western Texas & Pacific Railway Co.....	11,155.43
Galveston, Houston & Northern Railway Co.....	14,717.12

From Locomotive Mileage.

Galveston, Harrisburg & San Antonio Railway Co....	$107,877.04
New York, Texas & Mexican Railway Company....	3,435.98
Gulf, Western Texas & Pacific Railway Company..	1,838.50
Galveston, Houston & Northern Railway Company..	3,330.40

(16.) This court erred in not including in the basis for the calculation of the taxes to be paid by appellants, respectively, their receipts from "car service" as follows, viz:

Galveston, Harrisburg & San Antonio Ry. Co.....	$293,792.73
New York, Texas & Mexican Ry. Co.....	21,626.76
Gulf, Western Texas & Pacific Ry. Co.....	11,155.43
Galveston, Houston & Northern Ry. Co.....	14,717.12

(17.) This court erred in not including in the basis for the calculation of the taxes to be paid by appellants, respectively, their receipts, respectively, from "locomotive mileage," as follows, viz:

Galveston, Harrisburg & San Antonio Ry. Co.....	$107,877.04
New York, Texas & Mexican Ry. Co.....	3,435.98
Gulf, Western Texas & Pacific Ry. Co.....	1,838.50
Galveston, Houston & Northern Ry. Co.....	3,330.40

(18.) This court erred in not rendering judgment in favor of appellee, as plaintiff, against appellants, respectively, as de-
341 fendants, for the full amount of taxes sued for, as set out in plaintiff's original petition, the same being an amount equal to one per centum estimated and calculated upon the entire gross receipts of appellants (defendants) respectively, from every source whatsoever for the year ending June 30th, 1905, as shown by the report thereof made by appellant respectively to the Comptroller of Public Accounts.

(19.) This court erred in not rendering judgment in favor of appellee, as plaintiff, against appellants, as defendants, respectively, for the full amount of penalty sued for as set forth in plaintiff's original petition, same being ten per centum upon the amount of the tax of appellant, all as set forth in said petition.

(20.) This court erred in not rendering judgment in favor of appellee, as plaintiff, against appellants, as defendants, respectively, for the full amount of tax and penalty sued for in this cause, same

being an amount equal to one per centum estimated and calculated upon the gross receipts of defendants, respectively, from every source whatsoever for the year ending on the 30th. day of June, 1905, as shown by the report of defendant to the Comptroller of Public Accounts, together with a penalty of ten per centum upon the amount of such tax accruing thereon and added thereto, all as set forth in plaintiff's petition.

(21.) This court erred in not rendering judgment in favor of appellee, as plaintiff, against appellants, as defendants, respectively, for the full amount of forfeitures of $200.00 per day for each and every day after November 1st, 1905, down to and including
342 the day upon which this suit was filed, all as set forth in plaintiff's original petition.

(22.) This court erred in not rendering judgment in favor of appellee, as plaintiff, against appellants, as defendants, respectively, for the full amount of taxes and penalty, and forfeitures down to and including the day upon which this suit was filed, embracing a tax amounting to a sum equal to one per centum estimated and calculated upon the gross receipts of defendant from every source whatsoever for the year ending on the 30th. day of June, 1905, as shown by the report thereof by defendants, respectively, to the Comptroller of Public Accounts, and also embracing a penalty of ten per centum upon the amount of such tax accruing thereon and added thereto; and also embracing forfeitures of $200.00 per day for each and every day after November 1st, 1905, down to and including the day upon which this suit was filed, all as set forth in plaintiff's petition.

(23.) This court erred in not rendering judgment in favor of appellee, as plaintiff, against appellants, as defendants, respectively, for the full amount of forfeitures of $200.00 per day for each and every day from and after the day upon which plaintiff's original petition was filed in this cause down to and including the day upon which judgment in this cause was rendered, all as set forth in plaintiff's original petition.

(24.) This court erred in not rendering judgment in favor of appellee, as plaintiff, against appellant-, as defendant-, for the full amount of taxes and penalties and forfeitures down to and including the day upon which judgment was rendered, embracing a tax amounting to a sum equal to one per centum estimated and calculated upon the gross receipts of defendants, respectively,
343 from every source whatsoever for the year ending on the 30th. day of June, 1905, as shown by the report thereof by defendant to the Comptroller of Public Accounts, and also embracing a penalty of ten per centum upon the amount of such tax accruing thereon and added thereto, and also embracing forfeitures of $200.00 per day for each and every day after November 1st, 1905, down to and including the day upon which judgment was rendered, all as set forth in plaintiff's petition.

(25.) This court erred in not rendering judgment in favor of appellee, as plaintiff, against appellants, as defendants, respectively, in all respects as prayed for in plaintiff's original petition in this cause.

The opinion of Mr. Justice Key in this cause is erroneous for the reason that the tax involved is an occupation tax and is not obnoxious to any of the provisions of the Constitution of Texas relative to equality and uniformity; and it nowhere appears from the record in this cause that said opinion is shared in or entertained by either of the members of the court, or that it is in fact the opinion of this court.

This court, in holding that the Statute of Texas in question was unconstitutional and void and that the same sought to levy a tax on property, violated the following well known rules of statutory construction, viz:

(*a.*) "It is presumed that the Legislature does not design any attempt to transcend the rightful limits of its authority."

(*b.*) "Every act of the Legislature is presumed to be valid and constitutional until the contrary is shown. All doubts are resolved in favor of the validity of the act." If it is fairly and rea-
344 sonably open to more than one construction, that construction will be adopted which will reconcile the statute with the Constitution and avoid the consequence of unconstitutionality."

(*c.*) "The mind of the Legislature is presumed to be consistent; and in case of a doubtful or ambiguous expression of its will, such a construction should be adopted as will make all the provisions of the statute consistent with each other and with the pre-existing body of the law."

(*d.*) "It is presumed that the Legislature does not intend an absurdity, or that absurd consequence shall flow from its enactments. Such a result will therefore be avoided, if the terms of the Act admit of it, by a reasonable construction of the statute."

Appellee further shows that N. A. Stedman, Esq., who resides at Austin, in Travis County, Texas, is the attorney for appellant in this cause.

R. V. DAVIDSON,
Attorney General.
W. E. HAWKINS,
Assistant Attorney General for the State of Texas, Appellee.

Issuance and service of notice and copy of the foregoing motion are hereby waived, and service upon said motion is hereby accepted, and consent is hereby given that said motion may be submitted to and acted upon by the court forthwith.

N. A. STEDMAN,
Attorney for Appellants.

345 (Endorsed:) Motion 2476. No. 3882. Galveston, Harrisburg & San Antonio Railway Company, *et al.*, Appellants *vs.* The State of Texas, appellee. Motion of appellee for rehearing. Filed in Court of Civil Appeals, 3rd. Supreme Judicial District, Austin, Texas, April 4, 1906. R. H. Connerly, Clerk. Filed in Supreme Court May 26, 1906. F. T. Connerly, Clerk.

Cause No. 3749. Motion No. 2461.

GALVESTON, HARRISBURG & SAN ANTONIO RY. CO. ET AL.
vs.
R. V. DAVIDSON ET AL.

Opinion on Rehearing.

What we here say is also intended to apply to the other cases mentioned and named in the original opinion filed in the above styled and numbered cause.

Section 1 of appellees' motion for rehearing, and subdivisions *a*, *b*, *c*, and *d*, complain of the action of this court in adopting as the statement of the nature and result of the suit the allegations contained in plaintiffs' petition, which were copied in the opinion of the court. The motion for rehearing says that the petition "not containing a true statement of the nature of the suit, but consisting to a great extent of conclusions not supported by law or fact, especially the following conclusions," which are subdivisions *a*, *b*, *c*, and *d*. We did not undertake to copy from the petition filed in these cases, but our opinion contains this statement: "The statement of the nature and result of the suit which applies to all of the present cases is
346 substantially stated in the brief of the Galveston, Harrisburg & San Antonio Railway Company, which is as follows:" We then go on and copy literally from the brief referred to. But however, comparing this statement taken from the brief as to the nature and result of the suit with the allegations of the petition, we find that the statement is substantially the same as the facts alleged in the petition. There is more of a mole hill than a mountain in this objection, especially in view of the fact that if error was committed we were led into it by the express admission of appellees as contained on page 2 of their brief. On the page referred to in this statement: "The various grounds of unconstitutionality urged against said act in appellants' petition for injunction are shown with substantial correctness in their statement of the nature and result of the suit." Again: "Appellants' statement also correctly shows the answer interposed on behalf of appellees." There is no statement contained in the appellees' brief complaining of the statement of the nature and result of the suit as made by the appellants as being incorrect. Under the rules we can accept the statement as true when not objected to; and most assuredly should we be allowed to do this when the opposite party not only does not complain, but substantially approves that statement made by his opponent.

The appellees are mistaken, and seriously so, when they undertake to say in subdivision (d) that this court made a finding indicating that the tax and judgment rendered under the law in question would be a lien upon the property of the railway companies, and that the same would operate as a cloud upon the title and would lessen
347 the market value of the property. We made no such finding, and there is no intimation to that effect contained in the opinion.

Among others the following objections are urged in the motion for rehearing:

"13. The court erred in looking to or considering for any purpose the address of the Speaker of the House of Representatives at the close of the First Called Session of the Twenty-Ninth Legislature of Texas, and in construing said address as declaring the tax in question as 'levying taxes upon the gross receipts of railroads, telephone, telegraph, express and other companies, such an address not being a permissible source from which to derive a construction of the Act in question: Yet if it is desired to peruse said address for information generally, as to the history of our times, and of the Twenty-Ninth Legislature, we find that instead of the Speaker considering the same as an ad valorem tax, he expressly stated that the same was supplemental to a property tax.

"14. This court erred in construing the opinion delivered by Mr. Chief Justice Gaines of the Supreme Court of Texas in the case of Brady *vs.* Brooks, 14 Tex. Crt. Rep., 163, as being a construction by that court of the act levying the tax in controversy in this cause; it being manifest from said opinion and from the facts involved in the cause in which that opinion was rendered, that the Supreme Court of Texas had no occasion to construe and did not in fact construe said act in any respect, except to determine what officer should bring suits thereunder; and it being further manifest that in writing said opinion the Chief Justice did not have in mind any question as to the constitutionality of such tax, and that his reference to the act
348 was merely for identification thereof.

"15. The court erred in holding, as set forth in the written opinion filed by Mr. Justice Key, that the tax in question is a *property* tax, it appearing from the act that said tax is an occupation tax.

"16. The court erred in holding, as set forth in the written opinion of Mr. Justice Key, that the tax in question is obnoxious to the provisions of and contravenes the second section of Article 8 of the Constitution of Texas, which declares that 'all taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax'; it appearing from said act that the tax therein imposed upon appellant is an occupation tax and that the same is equal and uniform upon the same class of subjects within the limits of the authority levying the tax."

The opinion of Associate Justice Key should not have caused any confusion or mistaken idea as to what questions were decided and passed upon by the court. The Associate Justice was very careful to say that he was merely expressing his individual views; and, substantially, that his opinion does not undertake to declare what were the views of the court upon the questions that he mentions and discusses. The opinion of the court was prepared by the Chief Justice, and what is there said was approved by the entire court, and must be regarded as expressing its views. We did not undertake to lay any stress upon the statement made by the Speaker of the House, or what was said by the Chief Justice of the Supreme Court in Brady *vs.* Brooks; but, however, the failure to do so in no wise indicates that we

think it was improper in any respect for the Associate Justice
349 in his separate opinion to call attention to these statements.

It is a serious mistake upon the part of counsel for appellees to say in their 16th objection that this court held that the tax imposed was not equal and uniform on the class of subjects embraced in the law. We made no such ruling, but, on the contrary, to put this question at rest so far as this court is concerned, we desire to say that the Chief Justice and Associate Justice Eidson upon this subject, entertain a different view from that expressed by Associate Justice Key; and in consultation found, and now find, that there is no objection to the law on the ground of inequality or want of uniformity, if the law should be held to impose a tax upon the occupation.

The other questions raised in the motion have been duly considered. The motion is overruled.

FISHER,
Chief Justice.

Apr. 25th, 1906.

(Endorsed:) With App. No. 5106. No. 3749. Motion No. 2461. G. H. & S. A. Ry. Co. *et al., vs.* R. V. Davidson, *et al.* Appeal from Travis County. Opinion on motion for rehearing. Motion overruled. Filed in Court of Civil Appeals 3rd. Supreme Judicial District, Austin, Texas, Apr. 25, 1906. R. H. Connerly, Clerk. Filed in Supreme Court May 26, 1906. F. T. Connerly, Clerk. Fisher, Chief Justice.

350 *Order Overruling Motion for Rehearing.*

Apr. 25, 1906.

Motion 2476. No. 3882.

G. H. & S. A. Ry. Co.
vs.
THE STATE OF TEXAS.

Appeal from Travis County.

Motion for rehearing. The motion is overruled. Apr. 25, 1906.

Proceedings in the Supreme Court of Texas.

Petition for Writ of Error.

Filed May 26, 1906.

No. —.

In the Supreme Court of Texas.

THE STATE OF TEXAS, Plaintiff in Error,
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL., Defendants in Error.

Petition for Writ of Error and for an Order to Make and File Additional Conclusions of Fact.

To the Honorable Supreme Court of the State of Texas:

Your petitioner, The State of Texas, appearing herein by her Attorney General, applies for a writ of error to the Honorable Court of Civil Appeals for the Third Supreme Judicial District of
351 Texas for the removal of this cause from said court into this honorable court, and respectfully represents:

Eighteen suits of a similar nature for injunction were filed in September and October, 1905, in the District Court of the Twenty-sixth Judicial District of Texas, at Austin, for the purpose of testing the constitutionality of Chapter 141, pages 336-8, of the General Laws of the State of Texas, passed at the regular session of the Twenty-ninth Legislature, and commonly known as the "Love Bill," and hereinafter called the Railroad Occupation Tax Act, of the Tax Act.

Of these suits seven were tried, the others being yet upon the docket of the District Court awaiting the result of appeals in the seven cases which were tried.

In all of said suits which were tried, excepting only the one in which the Paris & Great Northern Railroad Company was plaintiff, said District Court overruled defendants' plea *in limine*, in the nature of a demurrer, to the effect that the suits for injunction were, in substance, suits against the State and should be dismissed, and upheld the constitutionality of said Act and refused to enjoin the State officers aforesaid from proceeding to enforce said statute.

In the Paris & Great Northern Injunction case, the District Court likewise overruled defendants' said plea *in limine*, and upheld the validity of said Act, but upon plaintiff's plea and proof of tender of what that court found was the proper amount of the tax of that plaintiff for the unexpired portion of the year 1905 remaining after said Act took effect, granted the injunction therein prayed
352 for. That case is still in said Court of Civil Appeals awaiting the result in the other cases herein mentioned which have heretofore been decided by said Court of Civil Appeals.

In the six injunction cases which were by it decided said Court of Civil Appeals also refused to sustain said plea *in limine*, and held said Act unconstitutional upon the ground that it is in conflict with the commerce clause of the Constitution of the United States, and thereupon reversed the judgments of said District Court and rendered judgments enjoining said State officers from proceeding under said Act.

Subsequent to the date of said judgments by said District Court in said injunction suits, the Attorney General, pursuant to the written request of the Comptroller of Public Accounts, filed in that court seventeen suits against twenty-four railroad companies for taxes, penalties and forfeitures under said Act, the amounts sued for aggregating approximately $1,000,000, two of the suits embracing, for convenience, more than one defendant. Two of those suits against separate companies were, by consent, consolidated. In these sixteen suits by the State for taxes the trial court rendered judgments to the effect that the State was entitled to recover, in cases in which the line of railroad of the defendant lies wholly within this State, only 169/365th of one per centum, estimated and calculated upon the gross receipts of such defendant derived from the occupation of the transportation of passengers, freight and baggage, or either, including mail and express matter, and that in the instances in which the defendant's line of railroad lies partly within and partly without this State, such 169/365th of one per centum
353 should be estimated and calculated upon a certain proportionate part of one per centum of such receipts of such defendant, the said proportion to be ascertained by apportionment upon the basis of mileage of such defendant within and without the State of Texas, in the manner prescribed by said Act, and that in no instance was the defendant required to pay the tax on receipts from items such as rentals of track and terminal facilities, locomotive mileage, car service, telegraph, interest on deposits, etc., and that the State was not entitled to recover any penalties or forfeitures whatever.

One of said seventeen suits is still pending in the Court of Civil Appeals awaiting the decision of this honorable court in the other suits by the State. Upon appeal said Court of Civil Appeals, in each of said sixteen suits for taxes, held said tax statute unconstitutional, upon the ground above mentioned, and accordingly reversed the judgments of the trial court and rendered judgments against the State and in favor of the railroad companies. One of the judges of said Court of Civil Appeals, (Judge Key), filed a separate written opinion in which he expressed the view, in substance, that said Act is obnoxious to the provisions of the Constitution of Texas concerning equality and uniformity of taxation, and that for that reason, in addition to the reasons assigned in the opinion of that court, in which he concurred, said statute is unconstitutional. The opinion of the court was by that court declared to be applicable to all of said decided cases, including the injunction cases.

In each of said suits for injunction said State officers, and in each of said suits for taxes, the State of Texas, by attorneys, in due time, filed a motion for a rehearing, and all of said motions were
354 by said Court of Civil Appeals overruled on the 25th. day of April, 1906.

Excepting the assignment as to conclusions of fact, the motion for rehearing in this case duly presented the assignments of error which are herein presented.

In each of said suits for taxes the attorneys for the State duly filed a motion for additional findings of fact and all of said motions were also overruled by said court.

On the 9th. day of May, 1906, said Court of Civil Appeals in each of said injunction suits, and in each of said suits for taxes, rescinded the order which it had previously made overruling said motions for a rehearing, but afterwards, on the 11th. day of May, 1906, in each of said cases rescinded its said order of rescission.

The suit in which this petition is filed is one of said suits in the name of the State of Texas for taxes.

We assume that this court will consider all of said suits for taxes together, and upon that assumption this application is prepared in the form in which it is here presented, in order that it may be used in each of those cases.

Statement, Conclusion of Fact, etc.

The court made and filed no separate statement or conclusions of fact in the suits by the State, but treated as its statement and conclusions of fact therein its statement made in the injunction cases.

We respectfully object to the statement of this case set out in the opinion of the Court of Civil Appeals upon the ground that it is not "sufficiently full and accurate," and we also object and assign error in the action of that court upon the further ground that it
355 made practically no statement of this case and made and filed no conclusions of fact therein as by law required.

Along with our motions for rehearing we filed in said suits by the State, respectively, motions for additional conclusions or findings of fact (in the event our motion for rehearing be not granted), all of which motions were by that court overruled together. Omitting certain formal parts, said motions for additional conclusions or findings of facts were as follows:

"Now in the above styled and numbered cause comes the appellee, the State of Texas, by her Attorney General, and respectfully shows to the court that the findings of fact set out in the opinion of the court heretofore rendered in this cause are incomplete and insufficient, and not in accordance with the requirements of law;

Wherefore, appellee prays the court that in the event appellee's motion for rehearing heretofore filed in this cause be not granted, then and in that event this court prepare and file in this cause additional full, complete and specific findings of fact, embracing and covering each and every issue involved in this cause as shown by the pleadings therein, and especially embracing the following issues, viz:

First. Was the defendant at all times mentioned in plaintiff's petition a railroad corporation duly incorporated under the laws of the State of Texas? If not, what are the facts with regard to its incorporation?

Second. Has the defendant, in its corporate capacity, continuously since prior to June 30, 1904, owned, operated, managed and controlled a line of railroad lying wholly or partially within
356 the State of Texas for transportation of passengers, freight and baggage, or either, and if so, does such line lie wholly or partially, or only partially, within the State of Texas?

Third. What was the amount, if any, of the entire gross receipts of defendant from every source whatsoever for the year ending on the 30th. day of June, 1905, and from what sources were such receipts derived?

Fourth. Did the defendant duly make, under oath, a report in writing to John W. Stephens, Comptroller of Public Accounts of the State of Texas, showing, as required by Chapter 141 of the Acts of the Twenty-ninth Legislature of Texas, the gross receipts of such line of railroad from every source whatsoever for the year ending on the 30th. day of June, 1905? If so, what was the amount of such receipts, as shown by said report, and what, if any, did such report show as to the sources from which such receipts were derived?

Did such report show that the gross receipts so reported by defendant were received from, and were such receipts, or any part thereof, in fact, derived from a source, or sources, other than from transportation of passengers, freight and baggage, or either, and if so, what does such report show as to the nature and amount of such receipts, other than those derived from the transportation of passengers, freight and baggage, or either?

Was said report in all respects as required by the provisions of said Act?

Was said report filed in the office of, and accepted and approved by, said Comptroller of Public Accounts? And if so, upon what date or dates?

357 Did the Comptroller of Public Accounts consider said report, and did he thereupon calculate, estimate and assess the tax to be paid the plaintiff by defendant for the year 1905 under the terms and provisions of said Act? And if so, what was the date of such consideration, calculation, estimation and assessment, and what was the amount of the tax of defendant so estimated, calculated and assessed?

Was the amount of such tax so calculated, estimated and assessed by said officer equal to one per centum, of the gross receipts of defendant from all sources whatsoever for the year ending on the 30th day of June, 1905? If not, to what percentage of such gross receipts of defendant for said period of time was such tax equal to, and how were the amount and the rate per cent. of such tax ascertained, calculated and estimated?

What were the true and lawful amount and rate per cent., respectively, of the tax to be paid by defendant under the provisions of said Act during the year 1905?

Fifth. Did the amount of defendant's tax, under the provisions of Chapter 141 of the Acts of the Twenty-ninth Legislature of Texas, become due and payable to plaintiff, the State of Texas, through her State Treasurer, in Travis County, Texas, on October 1, 1905, and

was such tax paid by defendant to said State Treasurer, and if so, when?

Sixth. Was the tax prescribed by the Act in controversy in this suit paid by appellant to the State Treasurer of the State of Texas on or before the 1st day of October, 1905, and was such tax, plus a penalty of ten per cent. thereof, paid to said officer on or be-
358 fore November 1, 1905, and has such tax and penalty, or any forfeiture prescribed by said Act ever been paid?

Seventh. Did the Comptroller of Public Accounts of the State of Texas, on November 14, 1905, or any other time prior to the filing of this suit, in writing, request the Attorney General of the State of Texas to bring suit in the name of the State of Texas in Travis County, Texas, against the proper parties defendant, to recover all taxes, penalties and forfeitures mentioned in Chapter 141 of the Acts of the Twenty-ninth Legislature of Texas, and particularly against the defendant in this cause? And was this suit brought pursuant to and under and by virtue of said request?

Was such written request in all respects in compliance with the provisions of said Act, and if not, in what respect did it fail to comply therewith?

Eighth. What was the amount of the judgment of the trial court in this cause in favor of appellee and against appellant, and in calculating the amount of such judgment, what, if any, items of receipts of defendant were excluded from the calculation, and what were the amounts of such items, respectively?

Ninth. Did the defendant at any time make any valid or legal tender of its taxes under the provisions of the Act in controversy in this cause? And if so, when and to whom was such tender made, and what was the amount of such tender?

Tenth. Was the judgment of the trial court for the full amount of taxes prescribed by the Act in controversy in this cause for the entire year 1905, or for the portion of the year 1905 remaining after said Act took effect?

Among our objections we set down the following, which
359 were set forth in our said motions for rehearing in said injunction cases, viz:

1. The court of Civil Appeals erred in adopting as *its* statement of the nature and result of the suit, the *allegations* contained in appellant's petition and copied into the opinion of this court; said petition not containing a true statement of the nature of the suit, but consisting to a great extent of conclusions not supported by law or fact, especially the following conclusions, viz:

(*a*) That because appellants' line of railway was *authorized* to connect with other lines of railway in Texas, or outside of Texas, each of said appellants was thereby constituted in law an interstate transportation company for the transportation of freight, passengers and baggage, between points in Texas and points without, and between points outside of Texas and points within the State of Texas; the fact that appellants are authorized or required to connect with other lines of railway in Texas, or at the State line of Texas, not being material upon an inquiry as to the constitutional power of the Texas

State Government to levy an occupation tax upon the appellant for exercising its privileges to do business in Texas.

(*b*) "That appellants were required by the Constitution and laws of Texas to receive and transport freight and passengers between points within the State of Texas and points without said State, and between points outside of Texas and in the State of Texas;" the law being that each of said appellants,—a corporation of Texas,—is only required by the Constitution and laws of said State to connect with other railroads in said State, or with other railroad- at the
360 State lines, or on the boundaries of said State; and that no interstate service is required of appellant by the Constitution and laws of Texas.

(*c*) "That by the terms of said gross receipts tax bill the said John W. Stephens was required to estimate, assess and enforce the collection from appellants of one per cent. upon their entire gross receipts derived from all sources;" because it appears from said Act, which is made a part of the petition, that the same in no way authorizes the Comptroller or any other State officer to make an assessment, the tax which said appellants are required to pay not being an ad valorem tax, but a tax which the law, and not an officer named in the Act, assesses. (Insurance Co. *v.* State, 42 Texas, 637.)

(*d*) That in its statement of the nature and result of the suit this court erred in finding that the petition of appellants "showed that said tax and any judgment rendered therefor would be a lien upon the property of the railway company against whom the same was claimed, and would be a cloud upon the title of such property, and would lessen the market value of the same;" the fact being as appears from the petition itself, to which the Act in question was attached as a part thereof, that the allegation that the tax in question would constitute a lien upon the property of appellant, and that said tax would constitute a cloud upon said property, was stated merely as a conclusion of the pleader, and that the statute in question does not support such conclusions and does not make such a tax a lien upon said property or a cloud thereon, and that said tax would not in any event by virtue of the Constitution of Texas, or by any law of said State, constitute any lien upon the property of appellant, or any cloud, real or apparent, upon said property.

361 (*e*) In setting forth in its opinion that Act of the Legislature in question, this court erred in making a part of said Act the name or title given to it by the Secretary of State, such naming of the act by that officer being wholly immaterial and beyond his power or authority, and not being entitled to any consideration as a construction of the act in question by an executive officer of the State Government, same not having been intended by said officer as a construction of said Act.

(*f*) "That the appellees were attempting to estimate, assess and enforce appellant to pay one per cent. on their gross receipts for the year commencing July 1, 1904, and ending June 30, 1905, as a tax for the year beginning January 1, and ending December 31, 1905, when said gross receipts tax bill did not become a law until July 17, 1905, which was an attempt upon their part to enforce said law as a

retroactive or retrospective law in violation of the Constitution of the State of Texas;" it appearing from said petition and from said Act that the latter became effective on the 15th day of July, 1905, and not on July 17, 1905, and that if the tax prescribed by said Act to be paid by appellant during the year 1905 was not for the entire year 1905 it was for the portion of the year 1905 remaining after said Act took effect, as aforesaid; and that in any event the tax aforesaid was the same in amount whether for the entire year 1905 or for the remaining portion thereof after said Act took effect, and that consequently said appellees were not attempting to enforce said Act as a retroactive or retrospective law in violation of the Constitution of the State of Texas.

When we stated in our briefs in the Court of Civil Appeals that "the various grounds of unconstitutionality urged against
362 said Act in appellant's petition for injunction are shown with substantial correctness in their statement of the nature and result of the suits," we did so assuming that the court would consider and construe the allegations of the petitions in connection with the statute in question, which was set out as a part of each of the petitions, and that, when so considered and construed, the petitions did disclose the grounds and theory upon which the injunction suits were based. We certainly did not, in our said briefs, mean to adopt as correct, or to admit as true, the conclusions of the pleaders as set forth in the petitions for injunction.

We add that it is shown by the petitions, respectively, that the Texas & Pacific Railroad, the Missouri, Kansas & Texas Railroad, the Gulf, Colorado & Santa Fe Railroad and the Atchison, Topeka & Santa Fe Railroad lie partly within and partly without the State of Texas. With the exception that the petition in the International & Great Northern case does not contain the allegations as to levies by counties, cities and towns, the general scope and effect of the petitions for injunction are disclosed by the petition in the Galveston, Harrisburg & San Antonio Railway Company injunction case, the substance of which petition is set out in the opinion of the Court of Civil Appeals, and the Act in question is also set out in the petition and in said opinion.

In the answers filed by said State officers the plea, *in limine*, to the effect that such suit was, in substance and effect, one against the State of Texas and should be dismissed was in the nature of a demurrer to the jurisdiction of the court, and the other pleas of
363 said defendants were as shown in the opinion of the Court of Civil Appeals.

The foregoing refers to the "statement" in the injunction suits. What we conceive to be a fair statement of the nature and result of this suit by the State for taxes, etc., appears in our briefs on file in this cause, and for brevity we here pray the court to consider same as here set out in full.

Under all the existing circumstances, and in view of the orders made by the Court of Civil Appeals in two sets of cases above mentioned adopting opinions, etc., we deem it unnecessary to go into

further detail relating to or involving the matter of statements and conclusions or findings of fact in any of said cases.

Before taking up in their order the various assignments of error, we beg to call to the attention of this court the opinion of the Court of Civil Appeals overruling our motions for rehearing, and, in this connection, to say that said opinion, on rehearing, appears to have effectually set at rest any and all doubts which might reasonably have been entertained as to the views of that court upon two important questions treated of in our motions for rehearing. Said opinion on motion for rehearing unequivocally declares that in the opinion of that court:

First. The taxes prescribed by said Act do not and can not constitute a lien upon the property of the railroad companies.

Second. The provisions of said Act are not obnoxious to the requirements of the Constitution of Texas relative to equality and uniformity of taxation.

As to the later proposition, the separate opinion of Judge Key stated, in substance, as above shown, that he considered the
364 Act unconstitutional because in conflict with the provisions of the Constitution of this State requiring equality and uniformity in taxation. In our motions for rehearing we assigned error in the action of the court in holding the statute unconstitutional upon that ground; our purpose, of course, being not to misstate the holding or opinion of the court, as a court, but to preserve the point in the record and to evoke an express and unequivocal declaration from the entire court of its views upon that proposition, there being in the main opinion in the case, (in which the entire court concurred), no express declaration that the other members of the Court of Civil Appeals did not concur in the views expressed by Judge Key alone in his separate opinion.

As to whether or not the tax in question constitutes a lien upon property of the railroad companies, it seems that certain expressions in the original opinion of the Court of Civil Appeals led us into a misapprehension of the views of the court upon that question.

In its opinion upon the motions for rehearing, that court observed: "The appellees are mistaken, and seriously so, when they undertake to say in subdivision (*d*) that this court made a finding indicating that the tax and judgments rendered under the law in question would be a lien upon the property of the railway companies, and that the same would operate as a cloud upon the title, and would lessen the market value of the property. We made no such finding, and there is no intimation to that effect contained in the opinion."

In order that this court may understand that our assignment of error questioning what we understood to be, in effect, a holding by the Court of Civil Appeals that the tax constitutes a lien
365 upon property was not merely fanciful, we quote from the original opinion by Chief Justice Fisher as follows:

"The invalidity of the law which provides for the scheme of taxation is expressly and clearly charged. Its unconstitutional aspects, State and National, are pointed out, and, if enforced, it will be at the expense and cost of the complainants. In bringing these cases

within the liberal rule that prevails in the United States courts upon this subject we have had some difficulty in reaching the conclusion that the wrongs charged and threatened were of a nature calculated to injure or destroy the property rights of the plaintiffs. There is no seizure of property provided for by the statute, but the tax, if not voluntarily paid, can only be collected by a judgment which, in a suit brought by the State for that purpose, would afford a convenient opportunity to defend against it on the same grounds asserted in the bills filed in these cases. But the principal questions here involved arising upon the Constitution of the United States, we feel the necessity of following the courts of that government in determining the question under consideration; and, when viewed in the light of the decisions of those courts, we think the facts sufficient to show that the suit is not against the State.

"Assuming, for the purpose of this question, the unconstitutionality of the statute on the grounds alleged, the conduct of the officers named, if they should proceed under the law, would, to some extent, embarrass the plaintiffs and impose a burden upon them in furnishing reports and discovering their earnings, and the Comptroller would estimate thereon the tax, and assess the same, and the
366 State Treasurer would then make his demand for payment, which, if not complied with, the Comptroller would then demand and direct the Attorney General to bring suit to enforce the collection of the tax and the penalties provided for in the statute. If the law is subject to the objections urged, this conduct would constitute a wrong, not only in law, but in fact. The act of the Comptroller in directing the Attorney General to proceed to suit, would be equivalent to certifying an assessment to counties by a State Auditor, and in such cases it has been held that injunction would lie against the Auditor. Coulter *v.* Wier, 127 Fed Rep., 907; Taylor *v.* L. & N. R. R. Co., 88 Fed. Rep., 350, and Fargo *v.* Hart, 193 U. S., 490.

"A suit against the Auditor General of Pennsylvania to restrain the assessment of a tax without authority of law, was held not to be a suit against the State. Gregg *v.* Sanford, 65 Fed Rep., 151."

The conclusion of the Court of Civil Appeals on the question of whether the tax constitutes a lien upon property or not seems to be here summed up in its holding that "the act of the Comptroller in directing the Attorney General to proceed to suit would be equivalent to certifying an assessment to counties by a State Auditor, and in such cases it has been held that injunction would lie against the Auditor."

Our former conclusion as to the effect of this holding of the Court of Civil Appeals seems to us the most natural one which could have been entertained in view of the decisions which were quoted by the court in support of its conclusion as to the effect of the request from the Comptroller to sue, said decisions being as follows; viz:
367 Coulter *v.* Weir, 127 Fed. Rep., 897:

That was an action against Coulter as Auditor of Public Accounts of Kentucky, and was for the twofold purpose of enjoining the enforcement of a tax which had already been assessed for

State purposes, and to restrain the certification by the defendant of the valuations apportioned by the Board of Valuation and Assessment to the various counties, cities and towns wherein the franchise in question was exercised, for assessment for local purposes.

The application for injunction specifically averred that the defendant was threatening to proceed to enforce and collect the tax and penalties prescribed by the statute, and that, unless restrained, he would apportion and certify to the county clerks in more than nineteen counties in the State the proportionate amount of said assessment in accordance with the statute, and that, unless the Auditor be restrained by the court, petitioner would suffer irreparable injury and be subjected to a multiplicity of suits "and to an illegal lien upon its property within this State."

That court held that the suit was maintainable in so far as it sought to enjoin the defendant from certifying the assessments complained of to the county clerks, but that the suit was not maintainable in respect to the tax due the State, the Auditor having no other act to do under the statute and no authority to enforce the collection of the tax, same being payable "into the treasury" by the express terms of the statute. The opinion shows that the defendant denied that he had any power to distrain for the tax due the State,
368 and averred that the law of Kentucky contained no provision for the enforcement of the franchise tax so assessed in behalf of the State, except by suit brought in a court having jurisdiction, in the name of the State by the State's Attorney General. The court declared itself unable to find in the laws of Kentucky any other provision for the collection of said State tax.

The opinion of the Circuit Court delivered by Judge Lurton was to the effect that the bill, so far as it sought relief against the tax assessed, in behalf of the Commonwealth must be dismissed, but that the decree restraining the defendant from such assessment to the various counties, cities and towns should be affirmed.

In passing, we beg to call the attention of this court to the points of similarity in the Kentucky and in the Texas statutes relative to the tax in favor of the State, such tax being, in each instance, payable directly into the State Treasury by the taxpayer, and the only remedy in each case being by suit in behalf of the State for the taxes, which in Texas do not constitute a lien upon property, although, we infer from the report of the Coulter case, in the absence of the Kentucky statute, which is not now accessible, that in Kentucky the tax, if certified by the Auditor to the local authorities, would have become a lien upon the property of the petitioner.

Our Court of Civil Appeals appeared to us to have followed the doctrine which was applied in the Coulter decision to the local assessment, which seems to have constituted liens upon property, and we naturally assumed that such decision was based upon the idea that the tax levied by the Texas statute also constitutes a lien upon property.

369 Taylor *v.* L. & N. R. R. Co., 88 Fed. Rep., 350:

This was a suit against State officers to enjoin them from certifying a tax upon the L. & N. Railroad in the State of Tennessee

to be apportioned by the State Comptroller to the thirty-five counties, cities and towns in which the road lies.

The contention was made that the suit was, in effect, against the State. The first ground upon which the suit was permitted was to avoid a multiplicity of suits.

The court, however, further said: "Another ground for equitable relief is that the excessive tax, if not paid, will be a cloud upon the title of complainant for taxes assessed, or a lien upon its property in Tennessee. The tax is not void and the alleged illegal excess does not appear upon the record. It creates such an apparently valid incumbrance that a court of equity will interfere to remove it as a cloud if, in fact, it is illegal. Ogden City *v.* Armstrong, 168 U. S., 224."

Here we find in the opinion cited by our Court of Civil Appeals, in support of our views, the express declaration of the Federal Court, that the tax under consideration in the Taylor case constituted a lien upon property. Under these circumstances we construed the citation of the Taylor case to be more than an "intimation" that the Court of Civil Appeals considered the tax prescribed by our statute as creating a lien upon property, inasmuch as by holding that these injunction suits are not suits against the State, they followed the decision in the Taylor case.

Fargo *v.* Hart, 193 U. S., 490:

This case arose under an Indiana statute which required the State Auditor to certify down the assessments made by the State Board of Tax Commissioners to the auditors of the various counties,
370 and also required the county auditors to place such assessments upon the tax duplicates to be used by the collecting officers. These facts are disclosed by the report of the case in the statement concerning the brief for the State of Indiana, citing Smith *v.* Smith, 159 Ind., 388, and cases therein cited on page 389.

The suit was based upon an application by the Adams Express Company for an injunction to restrain said State Auditor from so certifying an assessment of ad valorem taxes for the year 1898.

The court found that the assessment included certain capital of the company which was not within the State and not subject to assessment under its laws, and accordingly granted the injunction.

The State Auditor made no contention that the suit was one against the State. The assessment was invalid, and the taxes, if certified to the various county auditors, would have constituted a lien or cloud upon the property of the taxpayer.

The court held: "The tax is a tax upon property, not on the privilege of doing business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the State to the whole system. W. U. Tel. Co. *v.* Taggart, 163 U. S., 1, 21, 22."

In Texas the tax is for the continued exercise of the privilege of doing business within the State.

In granting the application for injunction the court, in the Fargo case, placed its decision upon the ground that "it avoids the neces-

sity of suits against the officers of each of the counties of the
371 State," and the cases cited in support of that proposition show that the injunction was allowed to prevent a multiplicity of suits, not against State officers but against county officers.

Consequently, in so far as the Fargo case has any bearing whatever upon the facts of our case, it is in line with our contention, and tends to confirm our former impression, that our Court of Civil Appeals meant to hold that the tax here in controversy constitutes a lien upon property.

Gregg *v.* Sanford, 65 Fed. Rep., 151:

This was a suit against the Auditor General of Pennsylvania to restrain the assessment of a tax, and it was held not to be a suit against the State, but the opinion of the court in that case contains the following language:

"This case, then belongs to that class of suits which have been sustained against individuals who, under color of State authority, have been guilty of, or threatened to inflict personal trespasses and wrongs."

The trespass or wrong consisted in perfecting an assessment which constituted a lien upon the title of complainant's property. At page 156 in the opinion of that court we find the following:

"Having regard to general principles, we think this case presents clear ground for equitable redress, aside from the meré illegality of the tax. The proceeding for the settlement of the taxes here is under the provisions of the Act of March 30, 1811, (P. L. 145; Purd. Dig. 1747), the twelfth section of which provides that the amount or balance, of every kind, settled agreeably to this Act due to the Commonwealth shall be a lien from the date of such settle-
372 ment on all real estate of the debtor within the Commonwealth. The bill alleges that the Adams Express Company is the owner of valuable real estate in the State of Pennsylvania within the cities of Philadelphia and Pittsburg, upon all of which the settlement of taxes will create an apparent lien and a cloud and prevent the company from selling or disposing of same until all the litigation concerning said taxes shall have been ended. Now, to prevent a threatened cloud upon the title to real estate, or to remove it if it existed, is an acknowledged head of equity jurisdiction, (citing authorities)."

The decision in Gregg *v.* Sanford continues, to similar effect, citing numerous authorities in support of the proposition that preventative relief by injunction against an illegal tax which would cast a cloud upon the title to real estate is within the settled powers of a court of equity.

Further on in the opinion of the Court of Civil Appeals this language is found:

"As said before, it not only appears that the State officers sought to be restrained are proceeding by special authority under the law in question, but if not prevented from the conduct of putting the law into operation, might, and doubtless would, result in a distinct injury and wrong to plaintiffs. It might create charges against them and burden their property with a liability and subject them to the inflic-

tion of penalties, which, if allowed to accumulate, would soon amount to more than the taxes."

In view of the fact that in nearly all of the decided cases in which an injunction to restrain the action of State officers has been granted upon the ground that the statute under which they were proceeding was unconstitutional, have involved some act of trespass or
373 some *tortuous* act, or the creation of a lien upon or cloud upon the title to property, we understood this language of the Court of Civil Appeals as carrying a very broad "intimation" that the tax here in controversy would constitute a lien upon the property of the petitioners, the railroad companies.

Our conclusion as to what must be the views of that court upon this point seemed confirmed by the fact that the Court of Civil Appeals expressly decided that the suits against our State officers were not suits against the State of Texas; a holding which, to us, still seems inconsistent with any other view than that such officers, if not restrained by law, would proceed under said Act to fix some lien upon or throw some cloud upon the title to the property of the railroad companies. No other contemplated trespass, tort or legal wrong within the meaning of those terms as used in the decisions upon the question of the right of an individual or corporation to sue State officers or a State without its consent, is alleged in the petitions for injunction.

The fact that the railroad companies may, in the event the injunctions be not granted, be sued for taxes, penalties and forfeitures, and that such suits, (while affording to the taxpayer a complete remedy for testing the constitutionality and validity of the statute prescribing the tax), will cause the railway companies the inconvenience, annoyance and expense which is always incident to such litigation, certainly does not constitute such legal wrong as to warrant this suit against State officers, or a writ of injunction against them.

In further support of our conclusion as to the meaning of the Court of Civil Appeals upon this point, attention is called
374 to the fact that said opinion declared that the petition of appellants (meaning the railroad companies) "showed that said tax and any judgment rendered therefor would be a lien upon property of the railway company against whom the same is claimed, and would be a cloud upon the title of such property and would lessen the market value of same."

It will be observed that the opinion does not say that the foregoing quotation was an averment contained in the petition, but that the petitions in the injunction cases so "showed." To our minds, this practically amounted to a declaration by that court of the legal effect of the Act, which, it must be remembered, was attached to and expressly made a part of said petitions, respectively.

Elsewhere in this application we call the attention of this court to the foregoing quotation, in objecting to the statement of the case which is set out in the opinion of the Court of Civil Appeals.

However, upon our motions for rehearing, the Court of Civil Appeals plainly declared that the tax prescribed by said Acts does not constitute a lien upon property.

So, if there ever existed any reason for misapprehension as to that court's views upon either of the two features here mentioned, such reason no longer exists.

Assignments of Error in Support of Application.

We will now take up the assignments of error showing the grounds upon which this application for writ of error is based:

Your petitioners show that in reversing the judgment of the District Court refusing the injunction prayed for, and in granting said injunction, and in rendering its judgment in this cause, said Court of Civil Appeals committed errors as hereinafter shown, viz:

First. The court of Civil Appeals erred in failing and refusing to make and file in this cause additional conclusions of fact as required by law and as prayed for in the motion therefor which was filed by your petitioners, and in overruling and denying said motion.

General Laws 1901, page 121.
General Laws 1901, page 122.
Nowlin *v.* Hall, 97 Texas, 441.

Second. The Court of Civil Appeals erred in holding that the tax in controversy in this cause is a property tax, or a "tax on the gross receipts of the railway companies and not an occupation tax;" it appearing from the Act that said tax is an occupation tax.

Authorities.

Constitution of Texas, Art. 8, Secs. 1, 2 and 17.
Albrecht *v.* State, 8 Texas App., 217.
Languille *v.* State, 4 Texas App., 322, and cases cited.
State *v.* Stephens, 4 Texas 137.
Aulanier *v.* Governor, 1 Texas, 664.
State *v.* Bock, 9 Texas, 369.
Thompson *v.* State, 17 Texas App., 258.
Texas Banking and Ins. Co. *v.* State, 42 Texas, 637.
Galveston County *v.* Gorham, 49 Texas, 289.
Blessing *v.* Galveston, 42 Texas, 660.
Fahey *v.* State, 27 Texas App., 161.
Higgins *v.* Rinker, 47 Texas, 396.
Pullman Co. *v.* State, 64 Texas, 274.
Maine *v.* Grand Trunk Railway, 142 U. S., 217.
State Railroad Tax Cases, 92 U. S., 603.
State Tax on Railway Gross Receipts, 15 Wall., 284.
Nathan *v.* Louisiana, 8 How., 73.
Cooley on Taxation, 3rd ed., 104, *et seq.*
Cumberland R. R. Co. *v.* State, 52 L. R. A., 756.
Capital City Water Co. *v.* Board of Revenue, 107 Ala., 303.
Railroad Co. *v.* V. Columbia, 54 S. C., 266.

It will be noticed that our statute does not denominate the tax therein prescribed an excise tax, a specific tax, a privilege tax or an occupation tax, nor does it in terms declare that the tax is levied upon the taxpayer for the privilege of exercising franchises within this State. Consequently, under the view of this statute reflected by the opinion of the Court of Civil Appeals, there arises here the question, whether or nor absence of such language from our statute constitutes it a statute levying an ad valorem tax upon property of the railroads and therefore unconstitutional, or whether said tax is in fact and in law an occupation tax. In our printed briefs now on file in the above mentioned cases, we have undertaken, with some care, to present argument to show that the tax is an occupation tax, and to that discussion we respectfully invite the attention of this court.

However, we desire to briefly allude to certain portions of the opinion of the Court of Civil Appeals holding that said tax is not an occupation tax but a property tax.

That opinion in discussing the Railroad Gross Passenger
377 Receipts Tax Act, which was repealed by the Love Bill, says:

"The law repealed related to tax on gross passenger earnings or an occupation tax, because the statute expressly made it so," etc.

This seems to be the keynote to the conslusion and holding of that court that the present tax is not an occupation tax.

Viewed from whatever standpoint, and considered in whatever light, the holding of that court that the tax here in controversy is not an occupation tax seems predicated upon and bound up in the idea that no statute should be held as prescribing an occupation tax unless its very terms specifically and expressly declare the tax to be a tax upon an occupation or business, or plainly name it an occupation tax.

This rule of construction seems to us to surrender "substance for shadow" and to be utterly at variance with the rule of construction which controlled the decisions in the cases above cited by us, and in many cases wherein a tax which was not by its terms expressly declared to be a tax upon the occupation or business of the taxpayer has, nevertheless, been found by the court to be an occupation tax, and, as such, upheld and enforced. Among such cases are the fol-owing:

Pullman Palace Car Co. *v.* State, 64 Texas, 274:

This case arose under the Act of March 4, 1881, which imposed on "every person, firm or association of persons owning or running palace, sleeping or dining cars not owned by the railroad company in this State," an annual tax of $2 per mile, etc.

The Supreme Court of Texas, in an opinion by Associate Justice Stayton, said:

"The tax contemplated by this part of the Act is not a tax
378 upon property, which, under the Constitution, must be taken in proportion to its value, nor is it a tax upon persons which must be uniform. It is a tax imposed upon a named business which may be carried on by natural persons or by corporations within this

State on property belonging to others; and such as is designated in the Constitution as an 'occupation tax.'"

State *v.* Stevens, 4 Texas, 137, arose under Chapter 122, page 151, of the Acts of 1848, the Act being entitled "An Act to raise a revenue by taxation" and providing among other things, "that each and every person or firm occupied in the sale of goods, wares, merchandise, vinous and spirituous liquors when sold in quantities of a quart or more, shall pay a tax of 20 cents on each $100 value of such goods, etc., and further providing "that the taxes assessed pursuant to this Act shall be a lien upon all property, real and personal, belonging to the person or persons so assessed, and upon whom the same be imposed. * * *"

Not one word does the statute say about an occupation tax by that name. Nevertheless, the Supreme Court of Texas upheld the tax as an occupation tax, saying: "There can be no doubt that the quarterly return could be legally required from the defendant as an occupation tax, if he was engaged in buying and selling merchandise, or receiving the same for sale as an agent or auctioneer."

This language was quoted approvingly in State *v.* Bock, 9 Texas, 369, and controlled the decision in that case.

Atlanta National Association *v.* Stewart, 109 Ga., 80:

In this case it was held that the tax of $1 for each telephone s-ation or box which was imposed by the Act of 1896 upon telephone companies was an occupation or business tax and not a tax upon
379 property.

The decision approvingly cites quite a number of other Georgia cases in support of the construction adopted.

Albertson *v.* Wallace, 81 N. C., 479:

In this case the court held that the tax in question was a privilege tax upon the occupations measured by the extent of the business, and not a tax upon the capital invested therein.

The view of the court is thus expressed:

"We see no just objection to the mode adopted for ascertaining and determining the amount of the privilege tax and making it dependent upon the extent of the business of which the amount of the aggregate purchases may be as accurate a test or measure as any other that can be adopted. This mode of taxing is, in our opinion, eminently fair and reasonable in its operation."

These cases sustain the proposition that a tax law should be construed according to the intention of the Legislature, even when it has given no name to the tax.

State *v.* Seaboard R. R. Co., 52 Fed. Rep., 450, under a North Carolina statute, holds in substance that, of several constructions of which a tax statute is susceptible, the court should adopt that construction which will uphold its constitutionality.

Kentz *v.* City of Mobile, 120 Ala., 630:

The charter of the City of Mobile authorized the city council "to levy and collect from all persons and corporations trading or carrying on any business, trade or profession, by an agent or otherwise, within the limits of said corporation, a license tax which shall be fixed and declared each year by ordinance of said corporation," and also, in addition to the license tax, it was provided that "a vehicle

license may be imposed in addition to business license, pro-
380 vided that said license shall only apply to vehicles used in the transportation of goods or merchandise, and vehicles used for hire at the public stands.

We quote from the opinion of the Supreme Court of Alabama in this case: "It is manifest that the business of occupation tax referred to is required to be determined by the number of drays or vehicles that are used in the transportation of goods, and that the number of drays and other vehicles are referred to, not to impose a tax on them as property, but simply to arrive at a proper ascertainment of a just amount of the license tax in each particular case. A party engaged in business in the city and employing drays or other vehicles for the transportation of their merchandise, or parties using vehicles at the public stands, may use one or many of them, and different persons may use more or fewer of them than other persons engaged in the same business. The number so used, therefore, was a proper, and, perhaps, as good a basis for determining the amount to be paid for the license to do the business, as any other—if not the best."

In Merrian *v.* New Orleans, 14 La. Ann., 318, the Supreme Court of Louisiana held that a city ordinance which declares that "a tax of $60 shall be assessed and collected from every keeper of a billiard table, the whole tax being levied on each and every billiard table," was intended to impose a license tax upon the particular calling or business of keeping a billiard table, and not a property tax upon the table itself.

In Hodgson *v.* New Orleans, 21 La. Ann., 301, a similar ordinance concerning the keeper of a warehouse was similarly construed, the court holding that the tax was upon the keeper and not
381 upon the warehouse, the Merriam case being quoted with approval.

In *Ex Parte* Cohn, 13 Nev., 424, a tax which was not specifically named was held to be an occupation tax.

Associate Justice Key, in his separate opinion, says:

"I regard the legislation in question, as to the character of the tax imposed, as ambiguous upon its face. * * *

"It is known as an historical fact that property taxation is and always has been the principal source of revenue in all of the American States, and especially in this State; and when the Legislature levies a tax without designating its character and fixes its amount by the value of property the idea of a property tax is at once suggested; and, unless other language in the statute indicates a different purpose, it is reasonable to hold that it was intended as a tax upon the property mentioned in the statute."

(Here, as in the main opinion by Chief Justice Fisher, we find reflected the idea that if the name "occupation tax" had been given to this tax by the Legislature the Court of Civil Appeals might have held it constitutional and valid.)

Judge Key has evidently fallen into error in assuming with regard to the tax in question that this tax act "fixes its amount by the value of property." From his language above quoted it would naturally be supposed that our statute fixes the amount of the tax

by the value of property owned, held or used by the railroad company; but not so, there being in the Act no reference whatever to property valuations. What Judge Key really had in mind was perhaps the receipts of the railroad companies, and to them, it
382 seems, he here refers as property; but we submit that the reference in the statute to such receipts is not to them as property but solely as a measure of the amount of business done by the corporation in the exercise of the franchise which has been granted to it by the State.

And we submit that, when thus properly construed, the statute carries no suggestion that the prescribed tax was intended to be a property tax, or a tax on gross receipts.

The observations of the Court of Civil Appeals with regard to local assessments and home rule are sound, abstractly speaking, and are unquestionably true as applied to property taxes in Texas, and if considered as a property tax, the tax prescribed by this Act must for those reasons fail. But this very fact furnishes a conclusive reason why the court should not construe the tax prescribed by this Act as being a property tax, when it may consistently and properly be construed as an occupation tax, and its constitutionality and validity be thereby upheld.

In the opinion of the Court of Civil Appeals we find the argument that the Legislature could not have intende- the tax prescribed in the Act under consideration as an occupation tax, because if it be construed to be an occupation tax, each county, city and incorporated town through which a line of railroad runs would be authorized to levy upon the railroad company an occupation tax of one-half the amount of the State tax prescribed in said Act.

We do not concede that such right exists. In fact, it may well be doubted whether such right does exist.

Article VIII, Section 1, of the Constitution of Texas, provides that the Legislature "may also impose occupation taxes,
383 both upon natural persons and upon corporations, other than municipal, doing any business in this State. It may also tax incomes of both natural persons and corporations, other than municipal; provided further, that the occupation tax levied by any county, city or town, for any year, on persons or corporations pursuing any profession or business, shall not exceed one-half of the tax levied by the State for the same period on such profession or business."

Is this constitutional provision self operative?

We have not been able to find any decision squarely in point upon the question here suggested. Various occupation tax acts in this State, for instance, the Act of 1899, page 201, concerning peddlers, expressly authorize the levy by counties, cities and towns of an occupation tax of one-half the amount of the State tax therein provided, indicating that the Legislature did not consider said constitutional provision self-operative. On the other hand, it may be said that the Legislature has passed statutes prescribing an occupation tax, but declaring that no county, city or town shall levy such tax thereunder, thus indicating the contrary view.

It is true that R. S., Art. 5050, bears upon this question, but, without stopping to run out the exceptions included therein, we call

the court's attention to the fact that it does not apply to cities or towns, and we know of no other statute which authorizes them to levy such tax. So it seems clear that even though Article 5050 authorizes such levy by counties, no city and town can make such levy unless the above quoted constitutional provision can be held to authorize such levy in the absence of statutory authority.

384 But if it be conceded, for the sake of argument, that under the law every county and city and incorporated town through which any of the lines of railroad run had a legal right to levy a tax of one-half the amount prescribed by this statute, there are three good and sufficient reasons why that would not affect the question now before this court, viz:

(*a*) The petitions for injunction allege only a mere apprehension upon the part of a taxpayer that such additional taxes may be levied, and there is no pretense that it has been done in any instance.

(*b*) Regardless of the aggregate amount of occupation taxes which might be levied against a taxpayer by the State and by counties, and by cities and towns, such tax would not, by reason of its mere magnitude, be unconstitutional or invalid unless, possibly, when it amounted to practical confiscation. The amount of the tax is for the legislature to determine.

(*c*) The taxes now before the court are for a portion of the year 1905, and all of that year is already in the past, and it is impossible for any county, city or town to now levy such additional tax for that period of time.

In the Main statute, which was upheld in Maine *v.* Grand Trunk Railway Co., 142 U. S. 227, the tax was called an excise tax, and in that decision the court declared that "the character of the tax or its validity is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment."

Mr. Cooley, in his work on Taxation, calls taxes other than ad valorem taxes "specific taxes."

385 The fact is that in the various States similar taxes are called by various names, at the will of the Legislature of the particular State, but in all essential elements the taxes are the same in principle, and are uniformly treated by the courts as occupation taxes.

The nature, character and effect of a tax can not be determined by the failure of the Legislature to give it a name, or to declare in so many words for what purpose, or with what design or intent the tax is levied; and especially is this true when, as in these cases, the tax can be sustained as valid and constitutional upon no other ground that that it is an occupation tax, or a specific tax under Article VIII, Section 17, of our Constitution. If possible a statute must be so construed as to uphold it.

Sutherland *v.* De Leon, 1 Texas, 305.
Osborne *v.* Florida, 164 U. S., 654.
Hooper *v.* California, 155 U. S., 648.
People *v.* State Board, 105 Am. St., 682, and cases cited.
Gibson County *v.* Pullman Co., 42 Fed. Rep., 572.
Price Co. *v.* Atlanta, 105 Ga., 358.

The opinion of the Court of Civil Appeals and the separate opinion of Judge Key, both declare that the character of the tax is doubtful. We think they are mistaken in that view and that the tax is upon the face of the act clearly an occupation tax. But if they are correct in their assumption, there should be applied the rule that it should be presumed that the Legislature intended to pass a constitutional act, and that rule should be applied in the initial stages of the process of reasoning, and not after the court has already found and declared
that the Act is unconstitutional, as seems to have been done
386 by the Court of Civil Appeals in deciding this case.

The opinion of that court, while announcing that the rule of presumption as to the constitutionality of the Act is correct, in the abstract, denies that the rule is applicable here, and places their holding upon the ground that they have already found that the Act is unconstitutional, and that the rule was never intended to sustain an unconstitutional measure.

Of course it was never so intended; but the rule has heretofore been considered useful in determining and before declarin- the constitutionality or unconstitutionality of statutes.

Third. The Court of Civil Appeals erred in holding that the tax prescribed by Chapter 141 of the Acts of the Twenty-ninth Legislature of Texas is not an occupation tax; it appearing from the Act itself, and from every legal source of information whatsoever, that the same is an occupation tax, and that in passing said Act the Legislature exercised a power which was not in contravention of any provision of the Constitution of Texas or of the Constitution of the United States.

Fourth. The Court of Civil Appeals erred in holding that Chapter 141 of the Acts of the Twenty-ninth Legislature of Texas was not a constitutional Act, and was null and void; it appearing from the caption and body of said Act, and from a true and legal construction of the terms and provisions thereof, that said Act required the taxpayer to pay an occupation tax to the State of Texas, and that the amount of such tax was to be determined by a constitutional and legal method plainly set forth in said Act.

Fifth. The Court of Civil Appeals erred in holding that the
387 Act complained of by the taxpayer in this cause is not free from doubt upon its face, and that the court was, therefore, authorized to look to other sources in order to determine the true intent and meaning of said Act; it appearing upon the face of said Act that its meaning is clear and unmistakable, and that it levies an occupation tax and not an ad valorem or property tax.

Remarks.

In discussing the nature and character of the tax imposed by said Tax Act for the purpose of determining whether the District Court had erred in holding it to be an occupation tax, the Court of Civil Appeals used this language:

"A solution of the question depends upon a proper application of the rules of construction; and the least that may be said of the Act

is that, resorting solely to the language used, its purpose and object is not entirely free from doubt."

For the purpose indicated, the court then looked to the Act imposing taxes on intangible assets, at page 351 of the General Laws of 1905, and commonly known as the Williams Bill, and also to the action of the Secretary of State "in providing a title for the Act in question;" and in his separate opinion, Associate Justice Key referred to a remark made by the Speaker of the House of Representatives in an address at the close of the Called Session in which he referred to said Tax Act and other statutes as "levying taxes upon the gross receipts of railroads, telephone, telegraph, express and other companies," and to the fact that Chief Justice Gaines, in Brady *v.* Brooks, 14 Texas Court Reporter, 163, in which case the Supreme Court held that the Attorney General was alone authorized to
388 bring suits under said Tax Act, referred to it as "the Act which imposed a tax upon the gross receipts of railway companies."

The whole idea and argument of the Court of Civil Appeals to the effect that in construing the Act in controversy the court should look to sources of information extraneous of the Act itself, such as the Journals of the Legislature and the Intangible Assets Act, is evidently predicated upon the proposition that the Tax Act is of doubtful meaning upon its face and that it is necessary, therefore, to resort to outside sources for ascertaining the intent of the Legislature in its enactment.

We respectfully insist that the Tax Act is intelligible and unambiguous upon its face, and that no resort to outside sources for aid in the construction thereof is necessary.

From caption to emergency clause, we have not been able to find one paragraph, sentence or syllable which indicates a purpose upon the part of the Legislature to prescribe a property tax. The Act manifestly prescribes an occupation tax for the continued exercise of the privilege of doing business within the State of Texas, and not a property tax.

When so construed said Act harmonizes with every provision of the Constitution of Texas regarding occupation taxes.

Why should not this Act be so construed as to permit it to stand? It is elementary that an Act should be so construed, if possible, and that the court should indulge all presumptions in favor of the constitutionality of a statute.

However, the opinion of the Court of Civil Appeals says: "The legislative action and reports concerning the law as appears
389 in its records and journals may be examined."

As we understand the rule thus stated, it is only applicable where the statute is upon its face ambiguous, or where its meaning can not be determined from an inspection of the Act itself. Our contention is that the rule has no application to this Tax Act, because upon its face it clearly and definitely shows the purpose of the Legislature to prescribe an occupation tax, and hence there is no necessity or occasion to resort to the journals or other sources to determine the character of the tax.

But even though the court should deem it necessary to resort to the journals, we think the Court of Civil Appeals draws an erroneous conclusion from the inspection thereof. The fact that the word "occupation" was stricken from the title during the passage of the Act through the Legislature may be explained upon grounds other than the Legislature thereby intended to declare that it was not an occupation tax.

For illustration, the Legislature in striking out the word "occupation" may have had in view the exercise by them of their general power to levy specific taxes other than occupation taxes, strictly speaking, and for which the Constitution of Texas, in section 17 of Article 8, provides, thus:

"The specifications of the objects and subjects of taxation shall not deprive the Legislature of the power to require their objects or subjects to be taxed in such manner as may be consistent with the principles of taxation fixed in this Constitution."

Referring to the Tax Act and to the Intangible Assets Act, the Court of Civil Appeals declares "both of these Acts refer to each other and are practically one scheme of taxation. The Legis-
390 lature evidently knew and understood the purpose of both. They called it and construed it to be a tax upon gross receipts. They had stricken out the other words that sought to give it a different effect; and knowing well what they intended when that was done, they, when called upon to name the Act and characterize the tax it imposed, in keeping with the previous intention and purpose, and in accord with the terms of the law, gave it the only name it was entitled to, unless we read into the law the words deliberately rejected and impute an intention which is disproved by the record."

This declaration that the Legislature knew and understood the purpose of both bills is inconsistent with other portions of the opinion of that court and with its holding that the Love Bill is unconstitutional, which holding seems to impute to the Legislature a want of knowledge of the English language and of the effect of the Love Bill, and a preconceived purpose to violate by its enactment the Constitution of Texas and also the Constitution of the United States. And in the passage quoted, the court, by the use of the words "unless we read into the law the words deliberately rejected" (meaning occupation tax), indicated clearly that if the rejected words were in the Act as finally passed its constitutionality might have been upheld by that court.

Indeed, from the opinion as a whole, it appears that the court practically announces that no statute will be held to levy an occupation tax unless the tax be expressly therein denominated "an occupation tax". To what purpose, then, was the inquiry:

"What's in a name?"

"That which we call a rose by any other name would
391 smell as sweet."

The expression in the Intangible Assets Act, "laying taxes upon the gross receipts," does not affect the question or the character of the tax levied by the Love Bill, because the section of the Williams Bill wherein these words are used creates no right, but it is merely

a recital of the intent of the Legislature to cease collecting occupation taxes under the Tax Act whenever the Intangible Assets Act was complied with. In other words, it was not a legislative construction of the Love Bill, but the language used was merely one of reference for identification of the tax imposed by the Love Bill and did not seek to define the nature of that tax. Again, the words used in the Intangible Assets Act, "laying taxes upon the gross receipts," are entirely consistent with the occupation tax levied by the Love Bill, and entirely inconsistent with any idea or theory that the tax thereby levied was an ad valorem tax.

Reference to railway gross receipts tax laws which have been upheld by the Supreme Court of the United States will show that in many instances such taxes were treated by that court as being occupation taxes, although the statute expressly declared that the tax was upon gross receipts.

The very fact that the Act in controversy repeals a law which expressly levied an occupation tax and in its stead substitutes another tax is strongly persuasive that the tax thereby substituted is also an occupation tax. Especially is this true when it is found that the tax before levied and called an occupation tax was upon receipts of passengers, while this tax is also upon passengers and the two additional items of baggage and freight.

392 Over against this view, the opinion of the Court of Civil Appeals contains the argument that the fact that the tax imposed by the Act under consideration is not to be paid by a railroad company which has paid the tax upon its intangible assets "is very persuasive of the idea that the Legislature did not intend to impose a tax upon the business or occupation of the carrier." Is not the court's conclusion a *non sequitur,* the fair deduction and conclusion being that the Legislature simply did not intend that the corporation should pay taxes for the same period of time under both laws?

The Court of Civil Appeals say: "If the law was designed as a tax upon occupation, it is difficult to believe that it was intended as a makeshift, which should be repealed by some other law which solely created a tax upon property." By "some other law" the Intangible Assets Act is evidently meant.

The Railway Occupation Tax Act is a makeshift, in the sense in which that word is used by Judge Fisher. The Legislature clearly saw that they could not so frame the Intangible Assets Bill as to derive, through it, any property tax revenue for the remainder of the year 1905, and that they could accomplish that result by means of an occupation tax statute; so they adopted that course, and the Tax Act now before the court is the result. The purpose was, primarily, to get revenue for a portion of the year 1905; after which time the Intangible Assets Bill was expected to produce the necessary revenue, it being therein provided that payment under it should relieve the taxpayer from payment under the Tax Act.

393 The view of the Court of Civil Appeals seems to be that the Legislature, acting within the realms of reason and sanity, could not contemplate or intend to pass any law by which a taxpayer could be relieved from paying an occupation tax for the

period of time during which he was required to pay taxes under the Intangible Assets Act. But such view can not be correct, because it is perfectly legitimate and proper for the Legislature to substitute an ad valorem tax for an ocupation tax, for the reason that occupation taxes are considered and treated by all the authorities as revenue measures in the same way as are ad valorem taxes.

The Tax Act now before this court occupies a somewhat unique position, standing as it does in the attitude of repealing on the one hand, what even the Court of Civil Appeals say is an occupation tax law because it is so designated therein, and on the other hand being subject to substitution, at the option of the taxpayer, by an ad valorem or property tax law, (the Intangible Assets Act). And it would seem that if our contention that the fact that the Tax Act under consideration supplants and takes the place of an occupation tax law tends to support the conclusion that it is itself an occupation tax law, is offset by the fact that it is in turn substituted, at the option of the taxpayer, by the Intangible Assets Act, which levies a property tax, then, the two deductions or conclusions as to the character of the tax prescribed by the Love Bill thus drawn by comparison with the two other statutes above mentioned, merely negative each other, and the result is that we have still made no progress through said comparisons in determining the character of the tax prescribed by the Act complained of in the petitions for injunction.

394 In other words, the fact that the tax prescribed by the Love Bill is in lieu of an occupation tax, is at least as cogent as the corresponding fact that necessity for payment of taxes accruing after January 1, 1906, under the Love Bill, may be obviated by payment of the property tax prescribed by the Intangible Assets Act.

The reference by the Court of Civil Appeals to the Intangible Assets Act throws no real light on the issues before this court, since that Act in every portion thereof, shows that the tax therein prescribed is a tax upon property and not an occupation tax.

The suggestion or argument of that court, that because that Act and the Tax Act before this court both indicate what persons or corporations are required to pay taxes, it must follow that both Acts levy a property tax, is not sound, for the reason that all occupation tax acts, like all other tax acts, point out persons who are subject to the tax, since a tax act would otherwise be without meaning and of no effect. All tax acts are directed at the subjects of taxation. An ad valorem tax act provides for a tax upon property and for ascertaining its value, while an occupation tax act has no reference to valuation of property and does not provide for its assessment; and better illustrations of these principles and of the difference between occupation tax statutes and ad valorem tax acts can not be given than the very Acts aforesaid; hence, the illustration of that court fails of its purpose, and on the contrary, serves to show that the Tax Act here in question levies an occupation tax rather than a property tax.

Sixth. The Court of Civil Appeals erred in looking to or
395 considering for any purpose the act of the Secretary of State wh reby he ascribed or gave to the Act in question a title or name, designating the same as "Railroads—Providing for the Levy, Assessment and Collection of a Tax on the Gross Receipts of;" such act upon the part of the Secretary of State being merely a clerical act, and not being required by law, and not being the construction of said Act by one of the executive departments of government, under the well-known rules and principles governing and regulating such acts of such executive officers.

Seventh. The Court of Civil Appeals erred in looking to or considering for any purpose the address of the Speaker of the House of Representatives at the close of the First Called Session of the Twenty-ninth Legislature of Texas, and in constructing said address as declaring the tax in question as "levying taxes upon the gross receipts of railroads, telephone, telegraph, express and other companies," such an address not being a permissible source from which to derive a construction of the Act in question; yet, if it is desired to peruse said address for information, generally, as to the history of our times, and of the Twenty-ninth Legislature, we find that instead of the Speaker considering the same an ad valorem tax, he expressly stated that the same was supplemental to a property tax.

Eighth. The Court of Civil Appeals erred in construing the opinion delivered by Mr. Chief Justice Gaines of the Supreme Court of Texas, in the case of Brady *v.* Brooks, 14 Texas Court Reporter, 163, as being a construction by that court of the Act levying the tax in controversy in this cause; it being manifest from said
396 opinion and from the facts involved in the cause in which that opinion was rendered, that the Supreme Court of Texas had no occasion to construe and did not in fact construe said Act in any respect, except to determine what officer should bring suits thereunder; and it being further manifest that in writing said opinion the Chief Justice did not have in mind any question as to the constitutionality of such tax, and that his reference to the Act was merely for identification thereof.

Remarks.

Over against the fact that this court, in Brady *v.* Brooks, *supra*, incidentally referred to this statute, in passing, as "the Act which imposed a tax upon the gross receipt- of railway companies," we lay down the proposition that the far more obvious import of that decision is that, in the opinion of this court, the statute then and now under review is not obnoxious to any provision of either the Constitution of Texas or the Constitution of the United States. In support thereof we cite the decision of the Supreme Court of the United States in Michigan Cent. R. Co. *v.* Powers, 26 Sup. Court Rep., page 462, decided April 2, 1906, wherein that court, in discussing a decision of the Supreme Court of Michigan which was rendered under circumstances similar to those under which the Brady case was decided, (both being mandamus cases and therefore

only indirectly involving the constitutionality of the statute), used this language:

"While this case did not directly determine the constitutionality of the statute, a fair implication is that it was not regarded
397 as obviously in conflict with the State Constitution, for in that event the court would scarcely have taken time to consider the validity of proceedings under its authority."

Article VIII, Section 17, of the Constitution of Texas.

Ninth. The Court of Civil Appeals erred in not sustaining the validity and constitutionality of the tax in question, under the provisions of Section 17 of Article VIII of the Constitution of Texas, which reads as follows, viz.:

"The specification of the objects and subjects of taxation shall not deprive the Legislature of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this Constitution."

The "Commerce Clause."

"Equal to" or "On" Gross Receipts.

Tenth. The Court of Civil Appeals erred in holding that the tax prescribed by said Act is a tax upon the gross receipts of the taxpayer, and is, therefore, obnoxious, to the Commerce Clause of the Constitution of the United States; it appearing from said Act that the tax is levied upon the corporation and not upon its gross receipts, and that such tax is defined by said Act as being, and is in fact, one equal to a given percentum of the gross receipts of the taxpayer, and not on such gross receipts, and that such gross receipts are not mentioned or referred to in the Act except as a basis for the amount of the tax; and it further appearing that such tax is valid and constitutional, and not obnoxious to any provisions of the Constitution of the State of Texas, or of the Constitution of the United States.

Authorities.

Little Rock & M. R. Co. *v.* St. Louis I. M. & S. Ry. Co., 59
398 Fed. Rep., 400.

Kentucky & I. Bridge Co. *v.* Louisville & N. R. R. Co., 37 Fed. Rep., 624.

Little Rock & M. R. Co. *v.* St. Louis I. M. & S. Ry. Co., 63 Fed. Rep., 775.

Remarks.

The Court of Civil Appeals in its opinion observes:

"Now, when we come to the main features of the case, its terms are suggestive of a purpose to tax receipts. In the first section the expression 'a tax equal to one per cent. on the gross receipts' is used.

In the proviso thereof, and in the second section, the language used is substantially a tax on gross receipts."

We do not so read said Act. The proviso in Section 1 of said Act expressly declares that in the case there under consideration it shall be the duty of the Comptroller to levy and collect "a tax equal to such other proportion of one percentum of its total gross receipts."

Section 2 also provided that the annual tax therein mentioned shall be "calculated on the gross receipts so reported." The last sentence in Section 2 provides that where additional reports and affidavits are demanded "he shall estimate such tax on the true gross receipts thereby disclosed," the word "estimate" as there used evidently meaning no more nor less than the estimate to be made by that officer shall be as provided in the first section of the Act; or, in other words, that the amount of the tax shall be equal to one percentum of the gross receipts.

Taking the Act as a whole, it is evident that the amount of the tax must be equal to, and not on, one per centum of the gross receipts.

399 The very fact that the Legislature took pains to use the words "equal to" instead of "on the gross receipts" indicates a desire to avoid the levy of a tax "on the gross receipts," and signifies their intention to refer to the receipts merely as the measure of the amount of the taxes.

The legislative expression, viz., "a tax equal to one per cent. of the gross receipts," is an expression, not of form or evasion, but one to express and which does express in adequate and sufficient language and with a legal effect the manifest idea and intent of the Legislature, not to place a tax on the gross receipts, but to define or provide the manner or method by which officers of the State government shall ascertain and collect from the persons or corporations thereby taxed the amount of their occupation taxes; and if this be true, then this purpose and intention of the Legislature so expressed cannot be nullified by the mere holding that they designed a violation of the Constitution, and in order not to be caught in the act sought to use language which might mislead and deceive the courts.

The opinion of the Court of Civil Appeals holds that "if the tax is upon gross receipts it is upon property and it could not in such case be used as a mere measurement to ascertain the amount of the occupation tax."

That very thing was done under several of the statutes and decisions of the Supreme Court of the United States, hereinafter mentioned.

The opinion of the Court of Civil Appeals also says:

"The bill we are now considering uses the expression 'a tax equal to one per cent. of the gross receipts.' Not much importance

400 can be attached to this fact as indicating that the tax is not on gross receipts, because it is apparent that the Legislature used the expression interchangeably with that of 'a tax on gross receipts.'"

We respectfully deny that in the Act under consideration the Leg-

islature used the above quoted expression interchangeably. The expression "a tax on gross receipts" cannot be found anywhere in the Act from caption to emergency clause; hence the two expressions cannot justly be said to have been used interchangeably. The nearest approach to the last quoted expression is found in the concluding portion of Section 2 of the Act, in this language: "Shall estimate such a tax on the true gross receipts thereby disclosed."

The plain meaning of this language is that the estimate to be made by the Comptroller, and not that the tax, is "on the true gross receipts.'

What is the Comptroller to estimate? A tax. How is the amount of the tax to be determined? The Comptroller shall estimate it on the true gross receipts" disclosed by the supplemental reports furnished in response to his demand.

The opinion of the Court of Civil Appeals analyzes the Texas statute and therefrom draws the conclusion that there is no distinction between a tax on gross receipts and a tax equal to a given per centum of the gross receipts.

As we have undertaken to show, the Act under consideration upon its face draws a sharp and well defined distinction between the two propositions, and expressly places this tax upon the corporation, or other taxpayer, and refers to the gross receipts merely for the
401 purpose of fixing a measure for the amount of the tax just as was done in the Maine case, which was upheld in the Supreme Court of the United States.

But suppose it be conceded, for the sake of argument, that the conclusion of the Court of Civil Appeals on this point is correct, and that there is in fact and in law no real distinction between a tax on gross receipts and the tax prescribed by the Texas statute; Have we then made any real progress in the discussion? We think not, in view of the fact that the Supreme Court of the United States has so often upheld a tax laid strictly, specifically and expressly upon gross receipts, if the mere literal phraseology of the statute, and not its legal effect and meaning, is to be considered.

The following quotations from various statutes and references to decisions thereunder will show how far the Supreme Court of the United States has gone in upholding railroad gross receipts taxes, and how often such taxes have been upheld, even when the statutes prescribing them declared them to be "on the gross receipts" rather than on an amount equal to a given percentum of such gross receipts.

Pennsylvania Statute of 1866.

"A tax on three-fourths of one per centum upon the gross receipts of said company."

Approved in State Tax on Railway Gross Receipts, 15 Wallace, 284, when applied to gross receipts of railroads from interstate traffic.

Pennsylvania Statute of 1868.

"A tax of three-fourths of one per centum upon the gross receipts of said company."

Approved when applied to gross receipts of railroads from
402 interstate traffic, in Erie Ry. Co. *v.* Pennsylvania, 21 Wallace, 492.

Pennsylvania Statute of 1877.

"A tax of eight-tenths of one per centum upon the gross receipts of said company."

In Pennsylvania Steamship Co. *v.* Pennsylvania, 121 U. S., 326, this statute was held unconstitutional as applied to gross receipts of steamship companies having no local business or property in Pennsylvania, and engaged solely in interstate commerce.

It will be noted that this Pennsylvania statute was by the Court of Civil Appeals found to be practically the same as the Texas statute, and this steamship case was by said court cited as conclusively showing the unconstitutionality of the Texas statute. But, as applied to the railroads doing business in Pennsylvania this provision was upheld, as next below shown.

Pennsylvania Statute of 1879.

"A tax of eight-tenths of one per centum upon the gross receipts of said company."

This statute is identical with the Pennsylvania statute of 1877, except that the latter statute is made to include other taxpayers.

Approved as constitutional when applied to gross receipts of railroads from interstate traffic in N. Y. L. E. & W. Ry. Co. *v.* Pennsylvania, 158 U. S., 431. Why, then, did not our Court of Civil Appeals uphold the Texas statute which they say is substantially the same as the Pennsylvania statute of 1879?

Delaware Statute of 1869.

"A tax of 3 per centum upon the net earnings or income re-
403 ceived by said railroad or canal company.

In 18 Wallace this statute was approved in the Delaware Ry. Tax Case, at page 206, when applied to gross receipts of railroads from interstate traffic.

Maine Statute of 1881.

"When such average receipts per mile shall not exceed $2250 the tax shall be equal to one-quarter per cent. of the gross transportation receipts," etc., the per centum increasing as the receipts vary in amount.

Approved in Maine *v.* Grand Trunk Ry. Co., 142 U. S., 217, as constitutional when applied to gross receipts of railroads from interstate traffic.

Michigan Statute of 1897.

"Upon all of such gross income not exceeding $2000 per mile of road actually operated within this State, two and one-half per cent. of such gross income," etc., the rate of per cent. varying with the receipts.

Approved as constitutional when applied to gross receipts of railroads from interstate traffic in Wisconsin and Michigan Ry. Companies *v.* Powers, 191 U. S., 387.

Dakota Statute of 1883.

"For the first five years after said railroad shall be or shall have been operated in whole or in part, two per cent. of such gross earnings; and for and in each and every year after the expiration of the said five years, three per cent. of the said gross receipts."

Approved as constitutional when applied to gross receipts of railroads from interstate traffic in McHenry *v.* Alford, 168 U. S., 651.

404 Maryland Statute of 1890.

"A State tax of one per centum shall be and is hereby levied annually upon the gross receipts of all railroads worked by steam incorporated by or under the authority of this State and doing business therein."

In C. & P. R. R. Co. *v.* S. D. L. R. A., 764 Md., the Court of Appeals of Maryland held this statute constitutional as applied to receipts of railroads from interstate traffic. It seems that the case was not appealed to the Supreme Court of the United States.

Texas Statute of 1905.

"Equal to one per centum of its gross receipts."

Would the Supreme Court of the United States reverse its decisions upholding similar statutes, and hold our statute unconstitutional? We cannot believe it.

Eleventh. The Court of Civil Appeals erred in holding that the tax prescribed by Chapter 141 of the Acts of the Twenty-ninth Legislature of Texas, when applied to the taxpayer in this clause, constitutes an interference with or regulation of interstate commerce, and is for that reason void under the provisions of paragraph 4, Section 8, Article 1, of the Constitution of the United States, commonly known as the "Commerce Clause."

Authorities.

Maine *v.* Grand Trunk Ry. Co., 142 U. S., 217.
State Tax on Railway Gross Receipts, 15 Wall., 284.
Wisconsin & Michigan Ry. Co. *v.* Powers, 191 U. S., 387.
Delaware Ry. Tax Case, 18 Wall., 206.
Erie Ry. Co. *v.* Pennsylvania, 21 Wall., 492.

405 New York, Lake Erie & Western Ry. Co. *v.* Pennsylvania, 158 U. S., 431.
McHenry *v.* Alford, 168 U. S., 651.
State Railroad Tax Cases, 92 U. S., 575.
Nathan *v.* Louisiana, 8 How., 73.
Home Ins. Co. *v.* New York, 134 U. S., 594.
Western Union Tel. Co. *v.* Taggart, 163 U. S., 1.
Horn Silver Mining Co. *v.* New York, 143 U. S., 315.
New York State *v.* Roberts, 171 U. S., 664, and cases cited.
Pacific Express Co. *v.* Siebert, 142 U. S., 350.
Cumberland Railroad Co. *v.* State, 52 L. R. A., 764.
Lacy *v.* Packing Co., 134 N. C., 567. (Affirmed January 8, 1906, by United States Supreme Court.)
Mich. Cent. R. Co. *v.* Powers, 26 Sup. Ct. Rep., 463, decided April 2, 1906.

Remarks.

We respectfully submit the following relative to several cases which were commented upon in the opinion by Chief Justice Fisher:

State Tax on Railway Gross Receipts.

In its discussion of State Tax on Railway Gross Receipts, reported in 15 Wallace, at p. 284, the Court of Civil Appeals admits that the tax in that case was levied on the gross receipts, but says that the doctrine therein announced upholding the tax was "treated really as overruled by Fargo *v.* Michigan, 121 U. S., 240, and Philadelphia Steamship Company *v.* Pennsylvania, 122 U. S., 326–8, and in cases by some of the State courts, and must also be considered as impliedly overruled by other cases, so far as it undertakes to impose a
406 tax upon the receipts that arose from interstate commerce, that is in so far as it imposes a tax strictly upon the receipts and not merely upon the franchises."

It will be noted that while this statement at first glance seems to be to the effect that the case of State Tax on Railway Gross Receipts had been overruled in all respects, the concluding portion of the above quoted paragraph practically admits that that case has never been overruled upon the second ground upon which the decision was based, viz: That it was a tax for the exercise of privileges under a franchise to do business in Pennsylvania. And this second ground, which the court recognizes as never having been overruled, is the very ground — which we contend that the tax under consideration should be upheld; our contention being that the statutes are practically to the same effect, the difference being in favor of the Texas statute, because under it the tax is declared to be equal to a given percentum of the gross receipts, while under the Pennsylvania statute the tax is expressly laid upon the gross receipts.

Instead of the last mentioned case being overruled, either expressly or by implication, it is practically affirmed in Fargo *v.* Michigan, 121 U. S., 242.

In fact, there was no need for overruling its former decision, aforesaid, in order for the court to decide as it did the Fargo case, since in the latter case a very different question was presented, in the decision of which it was said by the court, with reference to said case in 15 Wallace:

"The distinction between that case, which is mainly relied upon by the Supreme Court of Michigan in support of its decree,
407 and the one which we now have before us, is very obvious, and is twofold; First. The corporation which was the subject of that taxation was the Pennsylvania corporation, having the situs of its business within the State which created it and endowed it with its franchises. Upon these franchises thus conferred by the State, it was asserted, the State had a right to levy a tax. Second. This tax was levied upon money in the treasury of the corporation, upon property within the limits of the State, which had passed beyond the stage of compensation for freight and had become like any other property or money liable to taxation by the State. The case before us has neither of these qualities. The corporation upon which this tax is levied is not a corporation of the State of Michigan, and has never been organized or acknowledged as a corporation of that State. The money which it received for freight carried within the State probably never was within the State, being paid to the company either at the beginning or the end of its route, and certainly at the time the tax was levied it was neither money nor property of the corporation within the State of Michigan."

The effect of the Fargo decision was simply to hold that the Michigan statute was unconstitutional as applying to a car hiring company having no property in Michigan, and doing no local business in that State and engaged solely in interstate commerce. How can that proposition affect the issue in our cases?

Instead of being overruled, as indicated by the Court of Civil Appeals, the doctrine embraced in the second ground of the opinion in State Tax on Railway Gross Receipts, 15 Wallace, 284, has been repeatedly affirmed.

408 The decision in that case has been approved in the following, among other cases:

St. L. S. W. R. Co. *v.* Texas Grain Co., 15 Texas Ct. Rep., 372.
Osborne *v.* Mobile, 16 Wall., 481.
Delaware Railroad Tax, 18 Wall., 206.
Erie Railway Co. *v.* Pennsylvania, 21 Wall., 493.
Munn *v.* Illinois, 94 U. S., 135.
Hall *v.* De Cuir, 95 U. S., 487.
Maine *v.* Grand Trunk Ry., 142 U. S., 221.
Kidd *v.* Pearson, 128 U. S., 23.
Western Union Tel. Co. *v.* James, 162 U. S., 656.

For a very fine discussion of State Tax on Railway Gross Receipts, in connection with its twin sister, Case of the State Freight Tax, 15 Wall., 274, bringing out the distinguishing features in the two cases, and graphically showing how each of them sustains the doc-

trine upon which we rely, we refer the court to Cumberland Railroad Co. *v.* State, 52 L. R. A., 764. We consider the latter case, upholding the Maryland statute, a very valuable one in this discussion.

Steamship Case.

Chief Justice Fisher, in discussing the opinion in Steamship Company *v.* Pennsylvania, 122 U. S., 329, holds, in effect, that the statutes of Pennsylvania under which that case arose and the statute of Texas here under consideration are substantially alike, and that the opinion in the Steamship Case is direct authority for them to hold that the Texas Act is unconstitutional. That they mis-
409 apprehend the opinion in that case is made manifest by a perusal of it.

That was a case of a steamship company having no local business or property in Pennsylvania and engaged solely in interstate commerce, by sea; and as to the steamship company the court held the tax invalid, as an interference with interstate commerce. The defendant pleaded that all of its steamships were enrolled and registered under the laws of the United States for the coasting or foreign trade of the United States, and that the gross receipts so returned and upon which a tax had been levied were received by defendants for freight and passengers carried in said ships on the ocean and on the navigable waters of the United States between the State of Pennsylvania and other States of the United States, and between the States of the United States and foreign countries, and that no part of said gross receipts were received for the transportation of freight and passengers between places in the State of Pennsylvania or for the hire and use of said steamships within the State of Pennsylvania. (122 U. S., 328.)

Justice Bradley, in stating the case of the steamship company, said:

"The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different States and between the States and foreign countries and from the charter of its vessels, which was for the same purpose." So this transportation was purely and solely interstate and foreign commerce.

On page 342, referring to State Tax on Railway Gross Receipts, the opinion reads:

410 "The second ground on which the decision referred to was based, was that the tax was upon the franchise of the corporation granted to it by the State. I do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax upon the corporate franchise because by the terms of the Act it was laid equally upon the corporations of other States doing business in Pennsylvania."

The decision in this Steamship Case was solely upon the ground that the Act was unconstitutional, in so far as it applied to gross receipts of steamship companies having no local business or property in Pennsylvania, and engaged solely in interstate commerce.

The Supreme Court of the United States in 142 U. S., p. —, referring to the Steamship case, said:

"That was a case of a tax in terms upon the gross receipts of a steamship company incorporated under the laws of the State, derived from the transportation of property between different States and to and from foreign countries. Such tax was held without any dissent to be a regulation of interstate and foreign commerce and, therefore, invalid."

We do not question or doubt the correctness of that decision, nor are the views which we urge in this case in any way in conflict with that decision. Our statute, by its terms, only applies to every railroad corporation or the receiver thereof, or every other person, firm or association of persons, owning, operating, managing or controlling any line of railroad in this State.

411 It is in every material respect like the statutes in State Tax on Railway Gross Receipts and the Maine Case, and involved the exercise by the Legislature of Texas of the very power which all of the cases recognize as existing for levying an occupation or a privilege tax upon a corporation doing business in the State.

In the opinion of the Court of Civil Appeals we find the following:

"The case of the Philadelphia S. S. Co. *v.* Pennsylvania, referred to, is much quoted with approval by recent decisions of the Supreme Court of the United States. * * * It will be observed that the tax construed in this case provided for a tax of a per cent. upon the gross receipts of the company for tolls and transportation. The Act under consideration in the statute before us is practically to the same effect, omitting the word "equal," and is to the same effect when we consider the other parts of Sections 1 and 2 of the statute. It will be observed that when we parallel the statutes there is practically no difference between them. We find that the only difference, which is slight, between the two statutes, is that the Pennsylvania law expressly says 'for doing business within the commonwealth,' and the Texas statute has in it the words, 'on the gross receipts,' 'a sum equal to one per centum of the gross receipts.'"

And after some discussion of the Steamship Case, our Court of Civil Appeals took leave of it as though they considered that the Pennsylvania statutes, under which it arose, had been therein finally disposed of by the Supreme Court of the United States as unconstitutional when applied to a tax involving railroad gross receipts from interstate business.

Concerning the discussion by the Court of Civil Appeals of the Steamship Case, we respectfully offer the following observations:

412 (1) It may be conceded that the only difference between said Pennsylvania statute and our Texas statute are those mentioned in said opinion, and that neither statute expressly declares the tax thereby levied to be an occupation tax or a tax for the continued exercise of privileges under a franchise.

(2) The opinion in referring to the Texas statute places within quotation marks the words "on gross receipts," as though the tax

therein prescribed were levied on the gross receipts. As we have elsewhere herein undertaken to show, the statute will not bear this construction. It is the estimate of the amount of the tax which is made on the gross receipts, and the statute nowhere says or means that the tax is on gross receipts, the reference to the gross receipts being, as in the Maine case, merely for a measure to determine the amount of the tax.

(3) It may also be conceded, for the sake of argument, that if the additional words found in the Texas statute had been in the Pennsylvania statute the decision in the Steamship Case would have been the same as the one rendered, such additional words in the Pennsylvania statute (after their supposed embodiment therein), being obnoxious to the Commerce Clause of the Constitution of the United States, when applied to the receipts of a steamship company having no property and doing no business whatever within the State of Pennsylvania, and being engaged exclusively in interstate and international business.

But the Court of Appeals seems to have entirely overlooked the following facts, viz:

(*a*) The Pennsylvania statute of 1877 and the Pennsyl-
413 vania statute of 1879 are identical, except that the latter statute includes certain taxpayers who are not embraced in the law of 1877. This addition could not possibly, in any wise, affect the statute as applied to railroad companies.

(*b*) The Steamship Company Case was an action for the recovery of taxes under each of said statutes. Both statutes were involved in the decision.

(*c*) This same Pennsylvania statute of 1879, which, as we have seen, was held unconstitutional in the Steamship Case, as applied to the gross receipts of steamship companies having no business or property within the State but engaged solely in interstate commerce by sea, was afterwards by the Supreme Court of the United States in Erie Railroad *v.* Pennsylvania, 158 U. S. 431, held constitutional and not obnoxious to the Commerce Clause when applied to gross receipts of a railroad from interstate traffic, the railroad being operated within the State of Pennsylvania.

(5) Then if the Court of Civil Appeals be correct in declaring the Texas statute and the Pennsylvania statutes of 1877-79 practically the same, it must necessarily follow, logically, that the Texas statute should, under the authority of the last mentioned case, construing the latter Pennsylvania statute, be held valid and constitutional when applied to even interstate traffic of a railroad lying in whole or in part within the State of Texas.

In this connection we emphasize the fact that as stated in the opinion by Chief Justice Fisher, the Pennsylvania statute contains
no words expressly denominating the tax prescribed an occu-
414 pation tax, and yet in spite of that fact, in which respect it was like the Texas statute, the Supreme Court of the United States upheld its constitutionality.

We therefore submit that the argument of the Court of Civil Appeals for the purpose of showing the unconstitutionality of the

Texas statute, when tested by the decision in the Steamship Case, is in fact a very strong argument in favor of the constitutionality of the Texas statute; that is, if the opinion of the Supreme Court of the United States upon the question be considered good authority.

Maine Case, etc.

The opinion of the Court of Civil Appeals suggests the argument that the tax in the Maine Case was in lieu of all other taxes, and that this feature distinguishes that case from the cases at bar. We respectfully insist that the tax in the Maine Case was not in lieu of all other taxes. That is a fact which we think is made clear in our briefs, by an analysis of the statute of Maine, and by the opinion in that case itself.

But suppose it was in lieu of all other taxes; what difference does that make as regards interstate commerce?

The effect of the tax as a regulation of interstate commerce is identical, in principle, whether it be called an excise tax or an occupation tax, and whether it be in lieu of all other taxes, or in addition thereto.

Consequently, if valid when in lieu of all other taxes, it must be valid when in addition to other taxes.

And in numerous gross receipts tax cases it has been so held.

415 The Delaware Railroad Tax, 18 Wall., 209.
Erie Ry. Co. *v.* Pennsylvania, 31 Wall., 492.
State Tax on Railway Gross Receipts, 15 Wall., 284.
N. Y. L. E. & W. Ry. Co., 158 U. S., 434.

In the opinion of the Court of Civil Appeals we also find the following:

"The Maine Case has been cited with approval in other cases, but only apparently on the ground that it was authority in support of the rule that the States could tax a franchise as property of the carriers which had a local situs, or within the State; or in cases where the unit rule of taxation was up for application, or in that class of cases where the tax was upon the receipts in lieu of all other taxes which might be a permissible system if the amount does not exceed what would be the reasonable amount of the tax that could be assessed against the property."

That the above conclusion is erroneous is apparent from the opinion in Erie Railroad *v.* Pennsylvania, 158 U. S., 431, wherein the court, after holding that the statute in that case was valid and not obnoxious to the Commerce Clause, says:

"In Maine *v.* Grand Trunk Railway, 142 U. S., 217, it was held that a State statute which requires every corporation, person, or association operating a railroad within the State to pay an annual tax, to be determined by the amount of its gross transportation receipts, and further provides that, when applied to a railroad lying partly within and partly without the State, or to one operated as a part of

a line or system extending beyond the State, the tax shall be
416 equal to the proportion of the gross receipts of the State, to be ascertained in the manner provided by the statute, does not conflict with the Constitution of the United States, and that the tax thereby imposed upon a foreign corporation operating a line of railway partly within and partly without the State, is one within the power of the State to levy."

The Maine Case, in its application to interstate commerce, has been approved in the following cases:

Wisconsin & Michigan Ry. Co. *v.* Powers, 191 U. S., 387–8. In this late decision there was no dissent, the opinion being concurred in by all the court except Justice White, who express- no opinion, not having heard the argument at bar.

Western Union Tel. Co. *v.* Taggart, 163 U. S., 21.
Adams Ex. Co. *v.* Ohio, 165 U. S., 220.
Postal Tel. Cable Co. *v.* Adams, 155 U. S., 699.
Ficklen *v.* Shelby County, 145 U. S., 23.
New York, Lake Erie & Western Ry. Co. *v.* Pennsylvania, 158 U. S., 431.

Michigan Central R. Company *v.* Powers, 26 Sup. Ct. Rep., page 463. From the opinion of the Supreme Court in that case, rendered April 2, 1906, we quote the following:

"Maine *v.* Grand Trunk R. Co., 142 U. S., 217, is worthy of consideration on this question of legislative determination. The Legislature of the State of Maine graded the rate of an excise tax imposed upon railroads by the amount of their gross transportation receipts, and provided that, when a railroad was partly within and partly without the State, the gross receipts chargeable to the road within the State should be ascertained on the mileage basis. The
417 court below held that as the Grand Trunk Railroad was partly within and partly without the State of Maine, the imposition of the tax was a regulation of commerce, and, therefore, in conflict with the exclusive power of Congress over interstate and foreign commerce; and rendered judgment for the company.

"But this court, reversing that judgment, held that the reference to the receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a reasonable conclusion as to the amount of tax which should be levied, saying (p. 229, L. ed. p. 996, Inters. Com. Rep., p. 809, Sup. Ct. Rep., 122:

" 'If the amount ascertained were specifically imposed as a tax, no objection to its validity would be pretended. And if the inquiry of the State as to the value of the privilege were limited to receipts of certain past years instead of years in which the tax is collected, it is conceded that the validity of the tax would not be affected; and if not, we do not see how a reference to the results of any other year could affect its character.' "

We further beg to say, in passing, that this latest decision in 26 Sup. Ct. Rep., is directly in point and contains very valuable citations of authorities on several other issues in these cases which were

presented in both the lower courts, but not passed upon by the Court of Civil Appeals.

The decision in State Tax on Railway Gross Receipts, as well as the decision in the Maine Case, with respect to the validity of gross receipts railway tax when tested by the Commerce Clause, were quoted approvingly by the Court of Civil Appeals of the Fifth Supreme Judicial District, at Dallas, in St. Louis S. W. Ry.
418 Co. *v.* Arkansas and Texas Grain Co., 15 Texas Court Reporter, 372, wherein that court holds that "legislation may in a variety of ways affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution.

The question of the validity of a tax on railroads measured by gross receipts from interstate as well as intrastate traffic has been presented to the Supreme Court of the United States seven times in the history of that court, and the validity of the tax has been sustained each time the question has been considered by the court, as follows:

1. Reading Ry. Co. *v.* Pennsylvania, 15 Wall., 284, sustaining Pennsylvania statute of February 23, 1866. Decision rendering in 1872.

2. Delaware Railway Tax Case, 18 Wall., 206, sustaining statute of Delaware; in 1873.

3. Erie Ry. Co. *v.* Pennsylvania, 21 Wall., 492, sustaining Pennsylvania statute of May, 1868; in 1874.

4. Maine *v.* Grand Trunk Ry. Co., 142 U. S., 217, sustaining Maine statute; in 1891.

5. New York, Lake Erie & Western Ry. Co. *v.* Pennsylvania, 158 U. S., 431, sustaining Pennsylvania statute of June 7, 1879; in 1894. Quotes and approves Maine Case.

6. McHenry *v.* Alford, 168 U. S., 651, sustaining Dakota statute; in 1898.

7. Wisconsin & Michigan Ry. Co. *v.* Powers, 191 U. S., 387, sustaining Michigan statute of June 4, 1897; in 1903. Cites and approves Maine Case.

419 It is true that in the Maine Case there was a dissenting opinion which argued that the tax was on interstate commerce and therefore unconstitutional. The vital issue was clearly drawn.

The dissenting opinion seems to us to have furnished the inspiration for the argument of counsel for the railroad companies in these cases under our Texas statute, and for the adverse opinion of our Court of Civil Appeals. But in Wisconsin & Michigan *v.* Powers there was no dissent, nor was there in Mich. Cent. R. Co. *v.* Powers, on which the ink is hardly dry, and which expressly approved the decision in the Maine Case.

The opinion of the Court of Civil Appeals presents the view that if the tax be considered an occupation tax, then, since our statute makes no provision for segregating intrastate receipts from the entire receipts, the tax must necessarily be levied upon "receipts that arise from interstate commerce, as well as from local traffic," and that the Act is, consequently, obnoxious to the Commerce Clause.

To this suggestion of the court we reply that the tax is not upon receipts, whether derived from intrastate or interstate business, but is upon the corporation, "owning, operating, managing or controlling any line of railroad in this State," and the receipts are referred to merely as furnishing a fair measure to indicate the amount of the tax which should be paid for the privilege of exercising a franchise which has been granted by the State.

The opinion of the Court of Civil Appeals seems to proceed upon the theory and in effect to hold that the railroad company is required by law to handle interstate business, whether passengers or freight, on through contract; but there is no law requiring
420 them to do so. It was not required of them at common law, and there is no Act of Congress or rule of the Interstate Commerce Commission, or statute of the State of Texas, or rule of the Railroad Commission of Texas requiring it. Railroad companies which transact an interstate business on through contracts do so solely by virtue of private contracts and mutual arrangements among themselves and between themselves and their patrons.

Interstate Commerce Commission Report for 1905, pp. 9–10.
L. R. & M. R. Co. *v.* St. L. I. M. & S. Ry. Co., 41 Fed., 562.
Kentucky Bridge Co. *v.* L. & N. R. Co., 37 Fed., 570.
Southern P. Co. *v.* Interstate Commerce Commission, 26 Sup. Ct. Rep., 330, and cases cited.

The railroad companies are liable for the tax, although there is in the Texas statute no provision for segregating the receipts derived from their domestic occupation from the receipts derived from their interstate occupation. Under the laws of Texas and under their charters, it is the duty of the railroad companies to carry on their domestic occupation, and to handle passengers, freight and baggage within the State of Texas in compliance with law.

Will the mere fact that they voluntarily engage in interstate commerce and undertake to handle interstate traffic upon through contracts furnish a pretext for nullifying and declaring unconstitutional a statute which lays upon them an occupation tax for carrying on their business within this State?

The measure of the amount of that tax, as prescribed by our statute, is practically the same as that approved by the Supreme Court of the United States in the Maine Case, which decision it has
421 since repeatedly approved. We have not been able to find where any gross receipts tax which involved the doctrine of apportionment upon the mileage basis, as does the tax here in question, has ever been held obnoxious to the Commerce Clause. The statute under which arose the case of Western Union Tel. Co. *v.* State, 55 Texas, 314 (U. S., 105), which is referred to by the Court of Civil Appeals, did not involve any idea of apportionment.

We think it may safely be asserted that an unbroken line of decisions of the highest court in the land, announcing a doctrine in which all its members now concur, applies to and must control, in line with our contention, the main issue in these cases, and that under those decisions it must be held that the taxes in question here

are not obnoxious to Article 1, Section 8, subdivision 3, of the Constitution of the United States, which provides that the Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes.

The uncertainty of the Court of Civil Appeals as to the correctness of its own decision in these cases, upon the whole, is indicated by the fact that it rescinded its action in overruling our motions for rehearing in all of said injunction suits and in all of said suits for taxes, and subsequently rescinded its order of rescission.

Twelfth. The Court of Civil Appeals erred in holding that the tax under consideration in this cause is for any reason invalid under the Constitution of the United States.

If it is to be held to be the law of this State that when the
422 effect of an Act is in any sense, however remote, to affect interstate commerce the Act is unconstitutional, then no occupation tax can be collected in Texas except from people who do merely an intrastate business. In other words, no such tax can be collected from a merchant who buys goods in another State to be shipped into Texas, or from any lawyer who has foreign clients, etc. From every direction and in every quarter would arise the cry "you cannot collect occupation tax from me, because I am indirectly engaged in an interstate business."

In Foppiano *v.* Speed, 26 Sup. Ct. Rep., 138, is was held that a person who is engaged in selling liquors from a boat at the wharf at Memphis, Tennessee, was liable to an occupation tax under the laws of that State, notwithstanding the business of the boat was in navigating the Mississippi River and touching in various States.

Nathan *v.* Louisiana, 8 How., 79, was a suit for taxes under a Louisiana statute which provided that "each and every money or exchange broker shall hereafter pay an annual tax of $250 to the State, in lieu of the tax heretofore imposed on them."

The defense was that the sole business of the defendant was buying and selling foreign bills of exchange, which are instruments of commerce, and that the tax was repugnant to the Commerce Clause.

The Supreme Court of the United States held that "this is not a tax on bills of exchange," and that the statute was constitutional.

The opinion says:

"The taxing power of a State is one of its attributes of
423 sovereignty. And where there has been no compact with the Federal government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the State, which are not properly denominated the means of the general government; and, as laid down by this court, it may be exercised at the discretion of the State. The only restraint is found in the responsibility of the members of the Legislature to their constituents.

"If this power of taxation by a State within its jurisdiction may be restricted beyond the limitation stated, on the ground that the tax may have some indirect bearing on foreign commerce, the resources of a State may be thereby essentially impaired. But State power does not rest on a basis so undefinable."

American Steel and Wire Co. *v.* Speed, 192 U. S., 500.

We quote from the syllabus of the opinion is this case:

"Goods brought in original packages from another State, after they have arrived at their destination and are at rest within the State, and are enjoying the protection which the laws of the State afford, may, without violating the commerce clause of the Constitution, be taxed without discrimination like other property within the State, although at the time they are stored at a distributing point from which they are subsequently to be delivered in the same packages, through the storage company to purchasers in various States."

See, also, authorities cited at page 118, and following, in our briefs in the suits for taxes under the proposition that a State statute may affect interstate commerce without amounting to a regulation thereof within the meaning of the Commerce Clause.

424 Thirteenth. The Court of Civil Appeals erred in finding and holding that appellee, as plaintiff, was not entitled to recover of and from appellant, as defendant, any tax whatever based upon receipts derived from any source whatever, other than receipts from transportation of passengers, freight and baggage, or either, including mail and express matter.

Plaintiff in error also here makes the additional assignments of error shown in "Exhibit A," which is hereto attached, and prays that same be considered part hereof, the expedient of an "exhibit" being adopted to save time and expense in printing separately applications in many cases, a form of application which is the same except as shown in exhibits being used in all of said suits by the State.

Remarks.

We respectfully submit that in its opinion holding that the tax prescribed by our Railway Occupation Tax Act is not an occupation tax, but a tax upon property, and that said Act is unconstitutional, the Court of Civil Appeals disregarded the following well recognized rules of statutory construction, viz:

(*a*) "It is presumed that the Legislature does not design any attempt to transcend the rightful limits of its authority."

(*b*) "Every act of the Legislature is presumed to be valid and constitutional until the contrary is shown. All doubts are resolved in favor of the validity of the act. If it is fairly and reasonably open to more than one construction, that construction will be adopted which will reconcile the statute with the Constitution and avoid the consequence of unconstitutionality."

425 (*c*) "The mind of the Legislature is presumed to be consistent, and in case of a doubtful or ambiguous expression of its will such a construction should be adopted as will make all the provisions of the statute consistent with each other and with the pre-existing body of the law."

(*d*) "It is presumed that the Legislature does not intend an absurdity, or that absurd consequences shall flow from its enactments. Such a result will therefore be avoided, if the terms of the act admit of it, by a reasonable construction of the statute."

Premises considered, and in order that the errors of the Court of

Civil Appeals, aforesaid, may be duly corrected, your petitioners pray for a writ of error, as aforesaid, and for any and all such orders as may be right and proper in the premises, directing and requiring said Court of Civil Appeals to make and file a conclusion of fact upon each of the material issues in this case assigned, as above shown, in that court and in this Honorable Court.

General Laws 1905, page 71.
Nowlin *v.* Hall, 97 Texas, 441.

Your petitioners represent that N. A. Stedman, who resides at Austin, in Travis County, Texas and Baker, Botts, Parker and Garwood, who reside at Houston, in Harris County, Texas, are the attorneys of record of the above named defendants in error.

ROBERT V. DAVIDSON,
Attorney General,
WILLIAM E. HAWKINS,
Assistant Attorney General, for Plaintiff in Error.

426 (G. H. & S. A. Ry. Co.)

"EXHIBIT A."

(15.) The Court of Civil Appeals erred in not rendering judgment in favor of appellee, as plaintiff, against appellant, as defendant, for taxes based, estimated and calculated upon the entire gross receipts of appellants respectively from every source whatever for the year ending on the 30th day of Jun[illegible], 1905, as reported by defendants, respectively to the Comptroller of Public Accounts, including receipts as follows:

From Car Service.

Galveston, Harrisburg & San Antonio Ry. Co.	$293,792.73
New York, Texas & Mexican Ry. Co.	21,626.76
Gulf, Western Texas & Pacific Ry. Co.	11,155.43
Galveston, Houston & Northern Ry. Co.	14,717.12

From Locomotive Mileage.

Galveston, Harrisburg & San Antonio Ry. Co.	$107,877.04
New York, Texas & Mexican Ry. Co.	3,435.98
Gulf, Western Texas & Pacific Ry. Co.	1,838.50
Galveston, Houston & Northern Ry. Co.	3,330.40

(16.) The Court of Civil Appeals erred in not including in the basis for the calculation of the taxes to be paid by appellants, respectively, their receipts from "car service" as follows, viz:

Galveston, Harrisburg & San Antonio Ry. Co.	$293,792.73
New York, Texas & Mexican Ry. Co.	21,626.76
Gulf, Western Texas & Pacific Ry. Co.	11,155.43
Galveston, Houston & Northern Ry. Co.	14,717.12

(17.) The Court of Civil Appeals erred in not including in the basis for the calculation of the taxes to be paid by appellants, respectively, their receipts, respectively, from "locomotive mileage" as follows, viz:—

Galveston, Harrisburg & San Antonio Ry. Co.....	$107,877.04
New York, Texas & Mexican Ry. Co.....	3,435.98
Gulf, Western Texas & Pacific Ry. Co.....	1,838.50
Galveston, Houston & Northern Ry. Co.....	3,330.40

427 (18.) The Court of Civil Appeals erred in not rendering judgment in favor of appellee, as plaintiff, against appellants, respectively, as defendants, for the full amount of taxes sued for as set out in plaintiff's original petition, the same being an amount equal to one per centum estimated and calculated upon the entire gross receipts of appellants, (defendants) respectively, from every source whatsoever for the year ending on June 30th, 1905, as shown by the report thereof made by appellants, respectively, to the Comptroller of Public Accounts.

(19.) The Court of Civil Appeals erred in not rendering judgment in favor of appellee, as plaintiff, against appellants, as defendants, respectively, for the full amount of penalty sued for as set forth in plaintiff's original petition, same being ten per centum upon the amount of the tax of appellant, all as set forth in said petition.

(20.) The Court of Civil Appeals erred in not rendering judgment in favor of appellee, as plaintiff, against appellants, respectively, as defendants, for the full amount of tax and penalty sued for in this cause, same being an amount equal to one per centum estimated and calculated upon the gross receipts of defendants, respectively, from every source whatsoever for the year ending on the 30th. day of June, 1905, as shown by the report of defendant to the Comptroller of Public Accounts, together with a penalty of ten per centum upon the amount of such tax accruing thereon and added thereto, all as set forth in plaintiff's petition.

(21.) The Court of Civil Appeals erred in not rendering judgment in favor of appellee, as plaintiff, against appellants,
428 as defendants, respectively, for the full amount of forfeitures of $200.00 per day for each and every day after November 1st, 1905, down to and including the day upon which this suit was filed, all as set forth in plaintiff's original petition.

(22.) The Court of Civil Appeals erred in not rendering judgment in favor of appellee, as plaintiff, against appellants, respectively, as defendants, for the full amount of taxes and penalty and forfeitures down to and including the day upon which this suit was filed, embracing a tax amounting to a sum equal to one per centum estimated and calculated upon the gross receipts of defendant from every source whatsoever for the year ending on the 30th. day of June, 1905, as shown by the report thereof by defendants, respectively, to the Comptroller of Public Accounts, and also embracing a penalty of ten per centum upon the amount of such tax accruing thereon and added thereto; and also embracing forfeitures of

$200.00 per day for each and every day after November 1st, 1905, down to and including the day upon which this suit was filed, all as set forth in plaintiff's petition.

(23.) The Court of Civil Appeals erred in not rendering judgment in favor of appellee, as plaintiff, against appellants, respectively, as defendants, for the full amount of forfeitures of $200.00 per day for each and every day from and after the day upon which plaintiff's original petition was filed down to and including the day upon which judgment in this cause was rendered, all as set forth in plaintiff's original petition.

(24.) The Court of Civil Appeals erred in not rendering judgment in favor of appellee, as plaintiff, against appellant, as defendant, for the full amount of taxes, penalties and forfeitures
429 down to and including the day upon which judgment was rendered, embracing a tax amounting to a sum equal to one per centum estimated and calculated upon the gross receipts of defendants, respectively, from every source whatsoever for the year ending on the 30th day of June, 1905, as shown by the report thereof by the defendant to the Comptroller of Public Accounts, and also embracing a penalty of ten per centum upon the amount of such tax accruing thereon and added thereto, and also embracing forfeitures of $200.00 per day for each and every day after November 1st, 1905, down to and including the day upon which judgment was rendered, all as set forth in plaintiff's petition.

(25.) The Court of Civil Appeals erred in not rendering judgment in favor of appellee, as plaintiff, against appellants, respectively, as defendants, in all respects as prayed for in plaintiff's original petition in this cause.

(Endorsed:) App. No. 5115. In the Supreme Court of Texas. The State of Texas, Plaintiff in error, *vs.* Galveston, Harrisburg & San Antonio Ry. Co., *et al.*, Defendants in error. Petition for writ of error and for an order to make and file additional conclusions of fact. Filed in Court of Civil Appeals, 3rd. Supreme Judicial District, Austin, Texas, May 24, 1906. R. H. Connerly, Clerk. Filed in Supreme Court May 26, 1906. F. T. Connerly, Clerk. Robert V. Davidson, Attorney General, William E. Hawkins, Assistant Attorney General, for Plaintiff in error. Granted.

430 *Order Granting Application for Writ of Error.*

June 21, 1906.

App. No. 5115.

THE STATE OF TEXAS
vs.
G. H. & S. A. RY. CO. ET AL.

From Travis County, 3rd District.

This day came on to be heard the application of the State of Texas for a writ of error to the Court of Civil Appeals for the 3rd. District, and the same having been duly considered, it is ordered that same application be granted and the writ of error issue as prayed for and the cause be set for hearing on October 10, 1906.

Citation to Defendants in Error.

Issued July 2, 1906.

The State of Texas to the Sheriff or any Constable of Harris County, Greeting:

You are Hereby Commanded, by delivering to Galveston, Harrisburg & San Antonio Railway Company, New York, Texas & Mexican Railway Company, Gulf, West Texas & Pacific Railway Co. and Galveston, Houston & Northern Railway Company, if found in your County, or to Baker, Botts, Parker & Garwood and N. A. Stedham, attorneys of record, the accompanying certified copy of this writ, to summon said above named defendants in error to be and appear before the Supreme Court of the State of Texas, now in session at Austin, Texas, on Wednesday, the 10th day of October, 1906, provided this writ shall have been served ten days prior to that time; but if this writ shall not have been so served, then on
431 the first Wednesday next ensuing, ten days after such service, pursuant to a writ of error filed in the Clerk's Office of the Court of Civil Appeals for the Third Supreme Judicial District, and issued on the — day of July, 1906, wherein The State of Texas is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error should not be corrected, and why speedy justice should not be done to the parties in that behalf. And of this writ, with your action endorsed thereon, make due return within ten days from the day hereof.

Witness, the Hon. Reuben R. Gaines, Chief Justice of the Supreme Court of Texas, the 2nd day of July, in the year of our Lord one thousand nine hundred and six.

F. T. CONNERLY, *Clerk*,
[SEAL.] By J. S. MYRICK, *Deputy*.

(Endorsed:) In Supreme Court. The State of Texas *vs.* G. H. & S. A. Ry. Co. *et al.* Citation. Issued July 2, 1906. F. T. Connerly, Clerk Supreme Court. By J. S. Myrick, Deputy. Sheriff's return. Received July 3, 1906. Executed July 3, 1906, by delivering to the within named Baker, Botts, Parker and Garwood, the accompan-ing certified copy of this writ. A. R. Anderson, Sheriff of Harris County, by Chas. C. Quinn, Deputy. Fee 75¢.

432 *Order of Submission.*

Oct. 10, 1906.

No. 1594.

THE STATE OF TEXAS
vs.
G., H. & S. A. RY. CO. ET AL.

From Travis County, Third District.

Submitted on briefs and orally for both parties.

Opinion. Supreme Court of Texas.

Filed Nov. 7, 1906.

No. 1594.

THE STATE OF TEXAS, Plaintiff in Error,
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL., Defendants in Error.

From Travis County, Third District.

The defendants in error, the Galveston, Harrisburg & San Antonio Railway Company, The New York, Texas & Mexican Railway Company, the Gulf, Western Texas & Pacific Railway Company and the Galveston, Houston & Northern Railway Company were all incorporated under the laws of the State of Texas prior to the year 1905 and each of them was engaged in operating its line of railroad, which was situated wholly within the State, during the year 1905. Under an Act of the Legislature of the State of Texas, approved May 3rd, 1905, the Galveston, Harrisburg & San Antonio Railway Company acquired the property, franchises and rights of each of the other companies named and is responsible for all of the obligations of the said other railroad companies.

The Twenty-ninth Legislature of the State of Texas enacted the following statute, approved on the 17th day of April, 1905,
433 which took effect on the 15th day of July, 1905:

"An Act imposing a tax upon railroad corporations, the receivers thereof, and other persons, firms and associations of persons, owning, operating, managing or controlling any line of railroad in this State, for the transportation of passengers, freight and baggage or either, equal to one per cent. of their gross receipts, and providing for the collection and payment thereof, and repealing the existing tax on the gross passenger earnings of railroads.

"SECTION 1. Be it enacted by the Legislature of the State of Texas: Every railroad corporation, or the receiver thereof, and every other person, firm or association of persons, owning, operating, managing or controlling any line of railroad in this State, for the transportation of passengers, freight and baggage, or either, shall pay to the State an annual tax for the year 1905, and for each calendar year thereafter, equal to one per centum of its gross receipts, if such line of railroad lies wholly within the State; and if such line of railroad lies partly within and partly without the State, it shall pay a tax equal to such proportion of the said one per centum of its gross receipts as the length of the portion of such line within the State bears to the whole length of such line; provided, that if satisfactory evidence is submitted to the Comptroller at any time prior to the date fixed in Section 2 of this act for the payment of the tax herein imposed, that any other proportion more fairly represents the proportion which the gross receipts of any such railroad for any year within this State bears to its total gross receipts, it shall be his duty to levy and collect for such year from such railroad a
434 tax equal to such other proportion of one per centum of its total gross receipts.

"SEC. 2. For the purpose of determining the amount of such tax, the president, vice-president, general manager, treasurer or superintendent of such railroad corporation, or the receiver thereof, or such other persons, firm or association of persons, shall, on or before the first day of October, 1905, and annually thereafter, report to the Comptroller of Public Accounts, under oath, the gross receipts of such line of railroad, from every source whatever, for the year ending on the 30th day of June last preceding, and shall immediately pay to the State Treasurer the annual tax herein imposed, calculated on the gross receipts so reported. The Comptroller shall have power to require such other reports and affidavits as may in his judgment be necessary to protect the interests of the State, and he shall estimate such tax on the true gross receipts thereby disclosed, and assess and enforce the collection of such tax.

"SEC. 4. Should such report not be filed with the Comptroller, and the annual tax thereon estimated paid to the Treasurer on or before the 1st day of October of any year, a penalty of ten per centum upon the amount of such tax shall accrue thereon and be added thereto; and in case such report is not made or such tax and the penalty thereon are not paid on or before the 1st day of November thereafter, or in case of a failure to furnish the additional report or affidavit required by the Comptroller, for a longer period

than thirty days after demand therefor, or in case of failure to pay within thirty days any tax or additional tax assessed by the Comptroller under this act, every such railroad corporation, or receiver thereof, or other such person, firm or association of persons,
435 shall forfeit and pay to the State the sum of two hundred dollars for each day any of said reports or payments may be delayed, after the expiration of such periods, respectively.

"SEC. 5. The Attorney General is authorized and required, upon request by the Comptroller, to bring suit, in the name of the State, in Travis County, against the proper parties defendant, to recover all taxes, penalties and forfeitures mentioned in this act, and venue and jurisdiction of such suits is hereby expressly conferred upon the courts of Travis County. Service of all process issued in such suits may be had upon any officer or agent of such person, firm, association of persons, corporation, or receiver thereof, within this State, and such service shall in all respects be held legal and valid.

"SEC. 6. The Tax provided for by this act shall be in addition to all other taxes levied by law. Subdivision 30 of Article 5049, Revised Statutes of 1895, and any existing statute imposing a tax upon the gross passenger earnings of railroads, is hereby repealed.

"SEC. 7. The tax imposed by this act shall not be levied upon or collected from any person, firm, association, corporation, or receiver, owning, operating, managing or controlling any line of railroad in the State, after such person, firm, association, corporation or receiver shall have paid the tax upon its intangible assets, as provided for in an act of the Twenty-ninth Legislature, entitled, 'An Act for the taxation of the intangible assets of certain corporations, and to provide for the creation of a State Tax Board for the valuation of such intangible assets, and for the distribution of said valuation for local taxation, and for the assessment of said assets, and the
436 levy and collection of taxes thereon,' while the same may be in force and effect."

Each of said railroad companies made report to the Comptroller as required by the second section of said act of "its gross receipts from every source whatever." The reports were accepted and the taxes against each of the said railroads were by the Comptroller assessed upon the gross receipts of each company derived from all sources. Each of the said railroad companies refused to pay the tax assessed as required by law and each of them continued to refuse to pay the same until after the first day of November, 1905. This suit was instituted by the Attorney General of the State of Texas, in the name of the State, in the district court of Travis county, to recover the tax assessed against each of the said railroad companies and ten per cent. thereon for the failure to pay the same on October 1st, 1905, and also to recover of the said railroad companies the penalties declared by the said act for the failure and refusal to pay the said sums after the first day of November, 1905,—the State claiming a forfeiture of two hundred dollars for each day from the said first day of November until the filing of the suit on the 24th day of November, 1905, and two hundred dollars per day for each day from that time until the time the trial should occur. The defendants each

filed general demurrers presenting the question of the invalidity of the law because of its conflict with different provisions of — Constitution of the United States and the Constitution of the State of Texas. Special answers were also filed which presented the same questions in different forms. It was alleged that each of said roads was engaged in the transportation of passengers, freight and
437 baggage within the State of Texas which was destined to and came from points beyond the limits of the State and to foreign countries, as well as in the carriage of passengers, freight and baggage between points within the said State of Texas, and that the gross receipts of each of the said companies were made up of the earnings of such road in the carriage of inter-state commerce as well as intra-state commerce, which allegation was sustained by the evidence.

In the district court the case was tried without a jury and judgment was entered in favor of the State for 169/365 of one per cent. of the gross receipts of each railroad company derived from the carriage of passengers, freight and baggage within the State of Texas, including that which was destined to points beyond the line of the State and also that which came from points beyond the line of the State to the defendants' road within the State. The court refused to enter a judgment for the penalties of two hundred dollars per day, claimed by the State, upon the ground that the penalties were so excessive and unreasonable that they were void. Each railroad appealed to the Court of Civil Appeals for the third district, which, upon a hearing, reversed the judgment of the district court and rendered judgment for each railroad company.

It is contended by the railroad companies that the act under examination violates Article 14, Section 1, of the Constitution of the United States, because it denies to the railroad companies the equal protection of the law. The section of the constitution above referred to does not require absolute uniformity or equality in levying of taxes by the state government, but the Legislature may classify the different persons or subjects of taxation, and if
438 the tax levied upon each class is equal and uniform as to that class, then the law is not obnoxious to that provision of the Constitution of the United States. (Magoun *v.* Illinois &c., 170 U. S., 283.) In the case cited the court said: "The clause of the Fourteenth amendment especially invoked is that which prohibits a State denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances. The rule therefore is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations." We deem it unnecessary to cite other authority upon this point. The law in question acts uniformly upon all railroad companies of the class specified, that is,

"for the transportation of passengers, freight and baggage, or either." We are of opinion that there is no denial of equal protection of the law to the railroad companies by the terms of the statute not in its enforcement.

It is likewise urged that the statute under consideration is violative of the Fourteenth Amendment of the Constitution of the United States in that it takes the property of the railroad companies without due process of law. The railroad companies make the reports on which the assessments are made and the levy can only be enforced by regular proceedings in court. There is neither
439 in the assessment nor enforcement of the tax any denial of due process of the law. (Castillo *v.* McConico, 168 U. S., 674.)

The railroad companies assert and attempt to maintain by authority and argument the proposition that the law under investigation violates the following, Article 1, Section 8, Subdivision 4, of the Constitution of the United States: "The Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian Tribes," because (1) the tax is levied upon the gross receipts of the company derived jointly and indiscriminately from state and inter-state commerce; (2) because the railroad companies are engaged in the transportation of state and inter-state commerce and the state has no power to levy a franchise or occupation tax upon a corporation so engaged; (3) because the railroad companies are engaged both in state and inter-state and foreign commerce and, being chartered by the state, cannot abandon the state business, for which reason the law is void as affecting inter-state commerce.

If the statute under consideration were held to levy a tax upon the gross earnings of the railroads, it would be a tax upon the proceeds of inter-state commerce, therefore, it would be void because in conflict with Article 1 Section 8, Subdivision 4 of the Constitution of the United States, and it would also be an ad valorem tax and conflict with Article 8, Section 9, of the Constitution of this State, which declares that no more than thirty-five cents on the one hundred dollars of its value shall be levied upon property as an ad valorem tax. A Construction that places the statute in conflict with both constitutions will not be applied if it can be otherwise
440 properly explained. (Butter *v.* Pennsylvania, 10 How., U. S., 415; Mayor *v.* Cooper, 6 Wall., 251.)

In determining the validity of the law under the Federal Constitution our judgment must conform to the decisions of the Supreme Court of the United States, and it is pertinent for us to inquire as to what rules applicable to this case that learned tribunal has established. To that task we will address ourselves without undertaking to reconcile real or seeming conflicts in the decisions of that court. Finding in the case of Maine *v.* Grand Trunk Railway Co., (142 U. S., 217) a rule clearly expressed which is applicable to the facts of this case, we will follow and apply it as we understand it.

In the Maine case the statute provided that "every corporation, person or association operating a railroad in the state should pay to the State Treasurer, for the use of the state, an annual excise tax

for the privilege of exercising its franchise in this state," and the amount of such tax shall be ascertained as follows: That "the amount of the gross transportation receipts as returned to the railroad commission for the year ending on the 30th day of September next preceding the levy of such tax, shall be divided by the number of miles of railroad operated, to ascertain the average gross receipts per mile." The law provides that upon the average gross receipts per mile of each road a given per cent. should be assessed, varying with the differences in gross receipts per mile. In that case as in this, it was claimed that the tax was an interference with inter-state commerce and was a levy upon the gross receipts of the railroad company, but the Supreme Court of the United States held against that contention saying: "The court below held that the imposition of the taxes was a regulation of commerce, inter-state and foreign,
441 and therefore in conflict with the exclusive power of Congress in that respect; and on that ground alone it ordered judgment for the defendant. This ruling was founded upon the assumption that a reference by the statute to the transportation receipts and to a certain percentage of the same in determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company or any regulation of commerce which consist in such transportation. If the amount ascertained were specifically imposed as a tax, no objection to its validity would be pretended. And if the inquiry of the State as to the value of the privilege were limited to receipts of certain past years instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected; and if not, we do not see how a reference to the results of any other year could affect its character. There is no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred."

We think that the case now before us comes within the rule of decision laid down in that case. The only difference between the statute of Maine and the statute of Texas consists in the
442 fact that in the Maine statute the tax was declared to be an excise tax and was declared to have been levied for the privilege of operating its railroads in the State of Maine, while in the Texas statute no mention is made of the character of the tax nor of the fact that it is levied for the privilege of operating the roads in this State. If, however, the facts show that the tax levied under the Texas statute is in fact an excise tax, the absence of a designation of it as such will not change the effect of the statute. The terms of the Texas law and of the Maine statute are practically the same, and, measured by the Maine case, the law before us levies an excise tax. The language, "every railroad corporation, or the receiver thereof,

and every other person, firm or association of persons, owning, operating, managing or controlling any line of railroad in this state for the transportation of passengers, freight and baggage, or either, shall pay to the state an annual tax" &c., places the tax upon the person or corporation exercising the privilege to operate, manage and control the railroads within this state.

The language quoted is not appropriate for the levy of a tax on the gross receipts of the railroads but is apt when used to levy a franchise or occupation tax. It is such as was in common use by previous legislatures of this state for like purposes. The view most favorable to the railroads is that the law is susceptible of the construction that the tax is levied upon the gross earnings of the corporations, but that interpretation would render the law void; and, as we have said, the courts will not apply that construction which would destroy the law when a constitutional purpose can fairly be derived from its terms.

443 The proposition of the defendants in error that because they are engaged in the carriage of inter-state commerce they cannot be made to pay an excise or occupation tax on the business of carriers in the State of Texas under the franchises derived from this State is not maintainable and is not supported by the authorities cited thereto. In the case of Osborne *v.* Florida, 164 U. S., 655, the Supreme Court of the United States said: "It has never been held, however, that when the business of the company which is wholly within the State, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the State of the business of the company which is entirely local So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate there is no interference with that commerce by the statute." The taxes levied by the law under consideration is placed upon the exercise of the franchises within the limits of the State and in the carriage of local or State business. The reference to the gross receipts of the company is merely a means by which to ascertain the amount of the tax to be levied. The case of Kehrer *vs.* Stewart, 197 U. S., 60, is even more to the point. The complainant in that case represented a Chicago firm who shipped meat to Georgia for distribution to customers and in connection with the business of distribution the agent in the same building did a local business of selling meat. It was claimed that he was not liable to the State occupation tax, but the Supreme Court held that the was liable on his local business, saying: "If the amount of domestic business were

444 purely nominal, as, for instance, if the consignee of a shipment made in Chicago upon an order filled there, refused the goods shipped, and the only way of disposing of them was by sales at Atlanta, this might be held to be strictly incidental to an interstate business, and in reality a part of it, as we held in Crutcher *v.* Kentucky, 141 U. S., 47; but if the agent carried on a definite, though a minor, part of his business in the State by the sales of meat there, he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax.

There could be no doubt whatever that, if the agent carried on his interstate and domestic business in two distinct establishments, one would be subject and the other would not be subject to the tax, and in our view it makes no difference that the two branches of business are carried on in the same establishment." If the position taken by counsel for the defendants in error were true, then no State could levy an occupation or excise tax upon its local railroads chartered under its own law because it is a fact of common knowledge that all lines of railroad in the State carry freight and passengers destined to points beyond the State and that which come from without the State to points within it. The tax levied by the statute here involved is for the operation of the railroads in the carrying of State business; the tax is not upon the carrying of interstate commerce, or the proceeds of it. The fact that articles of interstate commerce are transported in the same cars at the same time will not exempt the roads from the tax for local business. (Kehrer *v.* Stewart, 197 U. S., 68.)

445 Upon the authority of Pullman Co. *v.* Adams, 189 U. S., 420, counsel for the defendants in error assert that because the railroad companies which are chartered by the State cannot abandon their local business and are also engaged in the carriage of interstate freight and passengers they are for that reason exempted from taxation for the exercise of the privilege within the State. We repeat, the tax levied by the law before us is for the carriage of freight, &c., within the State. In the case last cited the Pullman Company was a corporation created under the laws of another State and had the right to transact interstate business within the State of Mississippi without license or the payment of any tax whatever, and if the law of that State had placed upon such corporation the requirement that it should procure a license to carry on the business in the State and the terms of the law were such that it could not abandon its local business and at the same time transact its interstate business, there would necessarily have been an interference with and regulation of interstate commerce, and such law would have been void. In this case the corporations were created by the State of Texas and they are not required to secure any license to carry on their local business but are simply taxed for the use of the franchise in carrying on the local business under the charters that they hold from the State. The case of Crutcher *v.* Kentucky, 141 U. S., 47, illustrates the distinction that we have attempted to make. In that case the law of Kentucky required of a foreign corporation, the Express Company, to secure a license for the transaction of its business, interstate and local, within the limits of Kentucky, and the Supreme Court of the United States held that law to be

446 void. No authority has been cited which supports the proposition so broadly asserted by the attorneys for the defendants in error, and we are of opinion that there is no sound reasoning upon which such a claim can be based.

We are of opinion that the law in question is not in conflict with the provisions of the Constitution of the United States in any particular claimed by the attorneys for the defendants in error.

Defendants in error submit this proposition: "A franchise to be or to do is property; and since appellant has paid, in accordance with the law, taxes upon both its franchise to be and its franchise to do, to impose upon it an additional franchise tax, whether upon its franchise to be or upon its franchise to do, would produce double taxation." In argument counsel referred to the case of State of Texas *v.* Austin & Northwestern Railway Company, 94 Tex., 530, to support the contention, that the property of the railroad companies is subjected to double taxation. In that case the railroad company had rendered its railroad, etc., for taxes under the statute of the State which required that it should render "the whole length of the railroad and the value thereof per mile, which valuation shall include the right of way, road bed, superstructure, depots, grounds on which depots are situated, and all shops and fixtures of every kind used in operating said road." Article 5062 of our Revised Statutes provides that, "real property, for the purpose of taxation, shall be construed to include the land itself, whether laid out in town lots or otherwise, and all the buildings, structures and improvements, or other fixtures of whatsoever kind thereon, and all the rights
447 and privileges belonging to or in any wise appertaining thereto." The assessor and collector of Travis county placed an additional assessment upon the railroad company in the following language: "The intangible personal property of the said Austin & Northwestern Railway Company within the State of Texas, consisting of its rights, privileges, immunities, good will, contracts, and franchises to do and carry on business of a railroad company as common carriers of freight and passengers for hire, value of the same $835,048.00." This court held that the rendition by the corporation under the general law included its franchise to exist as a corporation and its franchise to do business in the operation of the railroad. After giving the reasons upon which it based the conclusion that the franchise of the corporation was included in the rendition prescribed by the statute, the court said: "If we are correct in this conclusion, then it follows that it was not the intention of the Legislature to tax the franchise of a railroad as a property separate from its real estate. To so tax it would lead to double taxation, which is not permitted." This conclusion was based upon the provision of the statute which included the franchise in the assessment of the real estate and thereby subjected it to the ad valorem tax fixed by law. The additional assessment made by the assessor and collector would have included the property right in the franchise embraced in the first assessment, and therefore the court held that it would constitute double taxation and was not permissible. The fact that the franchise is subjected in this state to an ad valorem tax as property does not militate against the right to tax the persons or the corporations using that property as an occupation any
448 more than would the taxing of the physical property of the railroads, as the tracks, right of ways, cars, etc., operate to prevent the imposition of occupation taxes for the use of them as instruments of transportation. There is nothing in the case cited which intimates a prohibition against levying an occupation tax

upon the company which may use the franchises taxed as property. As well might it be held that an ad valorem tax upon a store house, fixtures and goods would preclude an occupation tax upon the merchant for pursuing the business of selling the goods.

Article 8, Section 1, of the Constitution of this State contains the following provision: "It (the legislature) may also impose occupation taxes, both upon natural persons and corporations, other than municipal, doing business in this State." Since a corporation can carry on no business except that for which it holds a franchise from the state, it follows that any tax levied upon a corporation in this state for exercising the privilege of carrying on its business must be classed as an occupation tax under our constitution, and in all tests of the validity of such a tax, those provisions of the constitution which apply to occupation taxes must be the standard.

Counsel for the railroad companies assert that if the tax in question be an occupation tax, then it is invalid, because it is in conflict with this provision of Section 2 of the above Article: "All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax." It is claimed that the statute which levies the tax upon the railroad companies does not levy the same tax upon persons and other corpora-
449 tions engaged in the business of carriers within the limits of the state, therefore, the tax is not uniform and equal upon all the subjects of occupation tax. It will be observed that the provision of the constitution applies "to the same class of subjects" and not to the persons who may pursue the same character of business. The same rule of construction applies to the constitution of the state as is applied by the courts to the provision of the constitution of the United States, providing that no state shall deny to any citizen of the United States equal protection of the law, as it affects the power to levy taxes, and, so tested, the legislature had the power to constitute railroads, engaged in the carrying business, a class upon which to assess occupation taxes. Kehrer *v.* Stewart, 197 U. S., 69. In the case cited the court said: "As we have frequently held, the state has the right to classify occupations and to impose different taxes upon different occupations. What the necessity is for such tax and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the State Legislature." (Cook *v.* Marshall County, 196 U. S. 274.) While it is true, that language had special reference to the authority of the Federal Courts over the question, it is equally cogent when applied to the construction to be placed upon the State Constitution by our own courts.

It is also asserted that the taxes levied upon the railroad companies is not the same per cent. of the gross receipts of each of them derived from intra-state business, therefore, it is not equal and uniform as required by the clause of the State Constitution last above quoted. This proposition rests upon the fact that the gross earnings
450 of some of the railroads consist more largely of receipts from interstate business than others, hence one per cent. upon the gross earnings of each road would not be the same per cent. of

the local earnings of each road. This proposition is supported by Judge Key in a forcible separate opinion filed in these cases but not concurred in by the majority of that court. The contention is based upon the idea that the amount of the tax must be determined by the product of the occupation tax; in other words, a rate of taxation to be equal must be the same per cent. of the receipts of the intra-state business of each road. This view of the law has been contended for in many cases in the Supreme Court of the United States and has been determined adversely to the claim of the corporation. (Maine *v.* Grand Trunk Ry. Co. 142 U. S., 217; Insurance Co. *v.* New York, 134 U. S. 594.)

It is insisted by counsel that the law should not be construed to levy an occupation tax because of the consequences which would flow from it; that is, that each county, city and town through which the railroads should be operated, would have the right to levy fifty per cent. of the state tax for operating the road in and through such county, city or town, which would practically confiscate the property. If that were a proper construction of the constitution and the laws of this state, then, indeed, it would be a strong argument against putting such construction upon the law; but we are of opinion that such is not the correct interpretation of our constitution and laws.

The language of the constitution which is relied upon as authorizing such levy by counties, cities and towns is found in Section 1 of Article 8 of the Constitution, and is as follows: "The occupation tax levied by any county, city or town, for any year, on persons
451 or corporations pursuing any profession or business, shall not exceed one-half of the tax levied by the State for the same period on such profession or business." No authority to levy a tax is granted to counties, cities or towns by this language. The municipal corporations created by the legislature would have no power to levy such taxes except by authority derived from the legislative department of the government which is authorized to give power to those corporations to levy occupation taxes, hence the language quoted above is a precautionary limitation upon the power of the legislature to grant such authority. Without that provision the legislature could authorize the municipal corporations to levy a tax equal to that levied by the state, or greater, but under the constitution, expressed in the quotation, the authority of the legislature is limited so as not to exceed one-half of the tax levied by the state. Article 5050, Revised Statutes, confers authority upon the Commissioners' Court of the counties to levy taxes and contains this language: "And shall have the right to levy one-half of the occupation tax levied by the state upon all occupations not herein otherwise specially exempted." This provision of the statute applies only to the subjects mentioned in that article which specified a number of occupations that were subject to taxation. That it was not the intention of the Legislature to confer upon the Commissioners' Court power to levy taxes upon all occupations which might thereafter be made the subject of taxation by the statute is made manifest by the terms of the clause, "not herein otherwise specially exempted." The exemption therein specified could only apply to occupations named, hence the

authority to tax was limited to those named but not ex-
452 empted. There is no authority in the law under considera-
tion, nor in any other statute of this state, for any county, city or town to levy upon a railroad any occupation tax for the exercise of its franchise to operate and carry on its business as a carrier. The statute is not in conflict with the constitution of the state of Texas on this subject.

The state claims that the trial court erred, first—in not entering judgment in its favor for the whole of the annual tax for the year 1905, and second—in giving judgment in its favor for the penalties of $200 per day imposed by the act for the failure to pay the tax on the first day of November, 1905. Section 16, Article 1, of our Constitution is in these words: "No bill of attainder, *ex post facto* laws, retroactive laws, or any law impairing the obligations of contracts shall be made." If the act in question be construed to embrace the whole of the year 1905 and entitles the state to collect the full annual tax for that year, it would confer upon the state a right against the railroads which did not exist before the law took effect, and it would impose upon each railroad a burden to which it was not liable before the law became effective. It is quite plain that the act comes within the provision of the section of the constitution above quoted and is retroactive in its effect. (Sutherland *v.* De Leon, 1 Tex., 250.) The defendants in error claim that because the legislature could not impose the tax for the portion of the year which expired before the law became effective it cannot be inforced for any portion of the taxes
for the year 1905. The fact that the legislature had no
453 power to levy the tax for the time anterior to that at which
the law took effect does not render it void as a whole, but the court will give effect to it for that proportion of the time which expired after it became effective; that is, the court will sustain the tax so far as the legislature had authority to impose it. (San Antonio *v.* Berry, 92 Tex., 325.) The city of San Antonio had power to levy one per cent. per annum ad valorem tax on property, but the city council levied a greater per cent. to embrace a time for which the levy could not be made. It was contended that the entire levy was void, but this court sustained the tax, saying: "When suit is instituted by a city or county for the recovery of a tax due to it, and it is found that such tax is in part lawful and in part illegal, if the legal and illegal parts are capable of definite ascertainment and apportionment, a court will apportion the taxes and give judgment for that which might lawfully have been levied."

The trial court denied a recovery for the penalties prescribed by the act for a failure to pay the taxes assessed, of which ruling the state complains. Article 1, Section 13 of the Constitution of the State declares—"excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishment inflicted." The term "fines" is synonymous with that of penalties, and the section of the constitution applies to penalties prescribed by this act for the failure of the parties to pay the taxes. (State *v.* Horgan, 55 Minn., 184.) The declaration in the constitution that "fines" shall not be excessive makes it a question for the court to decide under all the

facts of each particular case. In this case the penalties of
454 $200 per day would in a year amount to $73,000. This penalty is inflicted for the detention of taxes assessed against the companies. The taxes claimed to be due from the Galveston, Harrisburg & San Antonio Railway Company would amount to $74,724. annually, so that the penalties for failure for one year to pay would be nearly one hundred per cent. of that amount. The tax assessed against the Gulf, West Texas & Pacific Railway Company would amount to about $1,555. for one year, but the penalties for nonpayment of this sum for a year would be $73,000. nearly fifty times as much as the amount of the tax. The assessment of a penalty of one hundred per cent. for the failure to pay a tax would seem to be sufficiently excessive to authorize a court to declare it to be excessive, but the assessment of more than four thousand per cent. upon the amount detained can leave no possible question that the penalties are out of all proportion to the amount of money detained, and the law must be held to be void for the penalties.

In his conclusions of law, the learned judge who tried this case gave substantially the following reasons for refusing to enter judgment for the penalties claimed. The state was claiming against the railroad companies more than twice the amount due to it under the law. If the railroad companies had paid the full amount demanded they could not have recovered back by suit against the state that which was unlawfully collected; the only remedy the corporations had was to await the action of the state and secure from the courts a proper construction of the law. The Treasurer of the State was not authorized to receive less than the sum assessed by the Comptroller,
455 hence the railroads could not pay the sum actually due and a tender of what the Treasurer could not accept would have been useless. The state, being in the wrong, cannot recover penalties which depended upon a failure of the corporations to perform a duty enjoined by law.

The judge of the district court excluded from the sum upon which the taxes were to be assessed against each of the railroad companies everything except the receipts for the transportation of passengers, freight and baggage. The state assigns error on this ruling, and claims that the gross receipts from all sources derived by the operation of the railroads in this state was the proper sum upon which to estimate the tax. This language of the act, "every railroad corporation, or receiver thereof, etc., shall pay to the state an annual tax for the year 1905, and for each calendar year thereafter, equal to one per cent. of its gross receipts," is without qualification and broad enough to include everything derived from the operation of the railroads within this state. But the second section of the act, by this language, makes clear the meaning of that quoted from the first section: "For the purpose of determining the amount of such tax, the president, vice-president, general manager, treasurer or superintendent of such railroad corporation, or the receiver thereof, or such person, firm or association of persons, shall on or before the first day of October, 1905, and annually thereafter, report to the Comptroller of public accounts under oath the gross receipts of such line

of railroad from every source whatever for the year ending on the 30th. of June last preceding." The declared purpose of this language is to fix the amount, the standard, by which the tax should be determined and it unequivocally expresses that to be the "*gross*
456 *receipts from every source whatever* from the line of railroad."

This can mean nothing more nor less than that all of the receipts derived from the operation of the railroad in Texas from whatever source are to constitute the fund upon which the one per cent. is to be assessed as an occupation tax for the operation of the railroad in carrying local freight etc. which cannot by fair construction include any sum which the railroad company may derive from any other source than the operation of its line of railroads, and the supposed complications cannot possibly arise. That the railroad officials understood what this law means is clearly shown by their returns made in conformity thereto and printed in their brief in this case. Thr trial court erred in not assessing the tax upon the gross receipts derived from the operation of the railroads.

It is ordered that the judgment of the Court of Civil Appeals be reversed, and, proceeding to enter the judgment that the trial court should have pronounced, it is ordered that judgment be here entered in favor of the State of Texas against each of the following named railroad companies, defendants in error, for 169/365 of one per cent. upon the gross receipts shown by the return made by each of the said railroad companies to the Comptroller of the State; that is, the State of Texas shall have and recover of the Galveston, Harrisburg & San Antonio Railway Company the sum of $34,597.68; and that the State of Texas have and recover of the New York, Texas & Mexican Railway Company the sum of $2357.55; and against the Gulf, West Texas & Pacific Railway Company the State shall recover the sum of $719.94; and against the Galveston, Houston
457 & Northern Railway Company the State shall recover the sum of $5778.11, with interest at six per cent. from the 8th day of December, 1905, the date of the judgment of the district court, together with all costs of this suit in each of the courts.

T. J. BROWN,
Associate Justice.

458 (Endorsed:) No. 1594. The State of Texas *vs.* G. H. & S. A. Ry. Co., *et al.* Opinion. Reversed and rendered for plaintiff in error. Filed in Supreme Court of Texas, November 7th, 1906. F. T. Connerly, Clerk. Brown, Associate Justice.

Judgment of Supreme Court.

Nov. 7, 1906.

NOVEMBER 7, 1906.

No. 1594.

THE STATE OF TEXAS
vs.
G. H. & S. A. RY. CO. ET AL.

From Travis County, 3rd District.

Opinion delivered by Associate Justice BROWN:

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Third Supreme Judicial District and the original transcript in said cause being before the Court, as well as the transcript showing the proceedings had in said Court of Civil Appeals and these having been duly considered, because it is the Opinion of this Court, that there was error in the judgment of the Court of Civil Appeals and District Court, it is therefore considered, adjudged and ordered that said judgment be reversed; And this Court proceeding to render such judgment as should have been rendered, it is ordered, adjudged and decreed that the plaintiff in error The State of Texas, plaintiff in the District Court do have and recover of and from the defendant in error, The Galveston, Harrisburg and San Antonio Railway Company, one of the defendants in the District Court and its Sureties Jake Keller and C. G. Pillot, the
459 sum of Thirty Four Thousand, five hundred and ninety seven and 68/100 dollars ($34597.68) with interest on said sum at the rate of Six per cent. per annum from the 8th. day of December 1905,—the date of the Judgment of the District Court; and that the State of Texas, plaintiff in error, do have and recover of and from the defendant in error, The Galveston, Houston & Northern Railway Company, one of the defendants in the District Court and its surities Jake Keller and C. G. Pillot, the sum of Five Thousand, Seven hundred and seventy eight and 11/100 Dollars ($5778.11) with interest on said sum at the rate of Six per Cent per annum from the 8th day of December, 1905, the date of the Judgment of the District Court; And that the State of Texas, plaintiff in error, do have and recover of and from the defendant in error, The New York, Texas & Mexican Railway Company, one of the defendants in the District Court and its sureties Jake Keller and C. G. Pillot, the sum of Two thousand, three hundred and fifty seven and 55/100 dollars ($2357.55) with interest on said sum at the rate of Six per cent. per annum from the 8th. day of December, 1905, the date of Judgment of the District Court; and that the State of Texas, plaintiff in error, do have and recover of and from the defendant in error, The Gulf, Western Texas & Pacific Railway Company, one of the defendants in the District Court, and its sureties C. G. Pillot and Jake Keller the sum of Seven hundred and nine-

teen and 94/100 dollars ($719.94) with interest on said sum at the rate of Six per cent. per annum from the 8th day of December, 1905, the date of the judgment of the District Court; It is further ordered that the Defendants in error The Galveston, Harris-
460 burg & San Antonio Railway Company, The Galveston, Houston & Northern Railway Company, The New York, Texas & Mexican Railway Company, and the Gulf, Western Texas & Pacific Railway Company and their sureties Jake Keller and C. G. Pillot pay all costs in this behalf expended in this Court and in the Court of Civil Appeals and this decision be certified to the District Court for observance.

Motion of Defendants in Error for Rehearing.

Filed Nov. 17, 1906.

In the Supreme Court of the State of Texas.

No. 1594.

THE STATE OF TEXAS, Plaintiff in Error,
versus
THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL., Defendants in Error.

To the Honorable Supreme Court of the State of Texas:

Herein come defendants in error, The Galveston, Harrisburg & San Antonio Railway Company, the New York, Texas & Mexican Railway Company, the Gulf, Western Texas & Pacific Railway Company, and the Galveston, Houston & Northern Railway Company, and move the court that the judgment and decree of this Honorable Court, rendered herein on the seventh day of November, 1906, in favor of the State of Texas and against defendants in error, that the State of Texas do have and recover of, from and against the said defendants in error, the following sums, to-wit:—

Against the Galveston, Harrisburg & San Antonio Railway Company, the sum of thirty four thousand, five hundred and ninety seven dollars and sixty eight cents	$34,597.68
461 Against the New York, Texas & Mexican Railway Company, the sum of two thousand, three hundred and fifty seven dollars and fifty five cents	2,357.55
Against the Gulf, Western Texas & Pacific Railway Company, the sum of seven hundred and nineteen dollars and ninety four cents	719.94
And against the Galveston, Houston & Northern Railway Company, the sum of five thousand, seven hundred and seventy eight dollars and eleven cents	5,778.11

with six per cent. (6%) interest on each of said sums, from December 8th, 1905, together with all costs in this suit in the District

Court of Travis County and in the Court of Civil Appeals of the Third Supreme Judicial District, and this court, said sums being adjudged against said defendants in error severally; be set aside, and a rehearing of this cause granted. And for cause, defendants in error say:—

First.

That the court erred in rendering judgment in favor of the State of Texas, and against defendants in error and each of them, for the sums hereinabove set out, or for any sum, for the following reasons, to-wit:—

1st. The Act of the Legislature of the State of Texas, approved April 17th, 1905, being Chapter 141 of the General Laws of the Twenty Ninth Legislature of Texas, entitled, "An act, imposing a tax upon railroad corporations, the receivers thereof, and other persons, firms and association of persons, owning, operating, managing or controlling any line of railroad in this State, for the transportation of passengers, freight and baggage, or either, equal to one per cent. of their gross receipts, and providing for the collection and payment thereof, and repealing the existing tax on the gross pas-
462 senger earnings of railroads," for which, see page 336 of the Acts of the Twenty Ninth Legislature by plaintiff set up, and under and by virtue of the provisions of which the tax herein sought to be collected, is levied; and to enforce the provisions whereof and to collect the tax therein levied and provided for, this suit is brought; is wholly invalid and void, for that said act of the Legislature of the State of Texas seeks to levy, and does levy, a tax of one per cent. (1%) upon the gross earnings of defendants in error, and each of them, said gross earnings including receipts from intra-state commerce, as well as receipts from inter-state and foreign commerce, for the year ending June 30th, 1905. That for and during said year, defendants in error, and each of them, were engaged in interstate and foreign commerce, and in receiving and transporting for hire, freight, passengers and baggage, both from and to points wholly within the State of Texas, and from and to points without the State of Texas and other States of the United States, and to foreign countries; and that for said year ending June 30th, 1905, the gross receipts of defendants in error were, as follows:

For the Galveston, Harrisburg & San Antonio Railway Company, the sum of seven million, four hundred and seventy two thousand, four hundred and fifty eight dollars and forty eight cents, ($7,472,458.48) of which five million, two hundred and nine thousand, three hundred and eighty nine dollars and seventy nine cents, ($5,209,389.79) were received from interstate and foreign traffic; one million, five hundred and seventy eight thousand, seven hundred and fifty five dollars and eleven cents (1,578,755.11) were received from intra-state traffic; and six hundred and eighty four thousand three hundred and twenty four dollars and forty
463 two cents ($684,324.42) were received from sources incapable of apportionment between the intra-state and interstate traffic, respectively.

That the gross receipts for said year, of the Galveston, Houston & Northern Railway Company, were one million, two hundred and

forty eight thousand, one hundred and seventeen dollars and forty seven cents ($1,248,117.47) of which nine hundred and forty six thousand, fifty seven dollars and forty nine cents ($946,057.49) were received from inter-state traffic; two hundred and fifty two thousand, five hundred and fourteen dollars and ninety five cents ($252,514.95) from intra-state traffic; fifty one thousand, five hundred and forty five dollars and three cents ($51,545.03) of such receipts being incapable of apportionment between the intra-state and inter-state traffic.

That for said year the Gulf, Western Texas & Pacific Railway Company received from all sources, one hundred and fifty five thousand, five hundred and eleven dollars and one cent. ($155,511.01) of which thirty one thousand, one hundred and twenty one dollars and eighty one cents ($31,121.81) *was* received from interstate traffic; ninety eight thousand, one hundred and forty two dollars and thirty two cents (-98,142.32) from intra-state traffic; and twenty six thousand, two hundred and forty six dollars and eighty eight cents ($26,246.88) *was* incapable of being apportioned between the inter-state and intra-state traffic.

That during said year, the New York, Texas & Mexican Railway Company received as gross earnings, five hundred and nine thousand, four hundred and fifty eight — and seventeen cents ($509,458.17) of which one hundred and eighty one thousand, twenty dollars and eighty cents ($181,020.80) *was* received from inter-state
464 traffic; two hundred and eighty one thousand, five hundred and fifty six dollars and nine cents ($281,556.09) from intra-state traffic; and forty seven thousand, one hundred and eighty one dollars and twenty one cents ($47,181.21) from sources incapable of apportionment between the inter-state and intra-state traffic.

That the court, in rendering and entering the judgment against each of said defendants in error, held that the tax of one per cent. (1%) levied by said Act of the Twenty Ninth Legislature, should be applied to the receipts of defendants in error from every source whatsoever, whether from intra-state or domestic commerce, or inter-state and foreign commerce, and holding that the Act was effective only for that portion of the year from July 15th, 1905, rendered judgment against defendant in error for 169/365 of one per cent. (1%) of their total gross receipts for the year ending June 30th, 1905, from every source whatsoever, including all receipts from inter-state and foreign traffic and commerce, from intra-state or domestic traffic and commerce, and from all other sources whatsoever, being incapable of apportionment between the intra-state and the inter-state and international commerce. That said tax by said Act of the Legislature so levied against defendants in error, and each of them, and thus enforced by the judgment of this court, is levied directly upon the receipts of defendants in error, from inter-state traffic and commerce and is a regulation of, and an interference with, commerce between the States, in violation of Article 1, Section 8, paragraph 4 of the Constitution of the United States, which provides that Con-
465 gress shall have power, "To regulate commerce with foreign nations and among the several States, and with the Indian Tribes."

2nd. Said Act of the Legislature is violative of, and in contravention of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the law, in this; That it appears from the uncontradicted evidence herein, that during the year ending June 30th, 1905, and before and since that time, a large portion of the commerce of the State of Texas was conducted by common carriers by water, in competition with defendants and other common carriers by rail, and that such competition by common carrier- by water was, and is a real and substantial competition with railway transportation, and to a large extent, affects the rates charged by defendants in error and other common carriers by rail. That the Act of the Legislature of the State of Texas, hereinabove referred to, does not impose, and no other Act of the Legislature of the State of Texas imposes a similar tax upon such common carriers by water, or upon any other common carriers except carriers by rail; and the same is unequal and discriminatory as against defendants in error and other railway companies, and deprives them, and each of them, of the equal protection of the law.

3rd. Said Act is violative of, and in contravention of, the Fourteenth Amendment to the Constitution of the United States, in that: It provides that the taxes thereby levied shall be in addition to all other taxes levied by law; and the court being judicially in-
466 formed, and the proof herein showing that the property of the defendants in error has been assessed, and is now assessed, and was for the year 1905, assessed for taxation upon an ad valorem basis and rate, as all other systems of the State of Taxes; to levy such additional tax of one per cent. (1%) upon the gross receipts of defendants in error, when a like tax is not levied upon other systems of the State of Texas, is an unequal, unjust and arbitrary discrimination against defendants in error, and each of them, depriving them, and each of them, of the equal protection of the law.

4th. Said Act is in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that: Defendants in error, and other railroads in this State, are selected from among the mass of persons and property in the State, and certain taxes are imposed upon them which are not imposed upon other persons and property therein; and the reports of certain persons, officers and agents required by said Act, are given the effect of an absolute assessment of said property for taxation; whereas, under the laws of the State of Texas, no tax of the same or a similar nature is imposed upon other persons and corporations, and the property of all other persons and corporations is assessed in proportion to its value, and not at an absolute, fixed and mathematical sum to be arbitrarily determined by a single officer, to-wit, the Comptroller of the State of Texas.

5th. Said Act of the Legislature, and the tax imposed thereby, and made effective by the decision of the court herein, is violative of Section 1, Article XIV of the Amendments to the Constitution of

the United States, in this: That the same is a tax of one per
467 cent. (1%) imposed upon the gross income of defendants in error and of other railway companies in this State; no like income tax being imposed upon other persons and corporations therein; defendants in error being thereby deprived of the equal protection of the law; and of their property, without due process of law.

6th. That said Act of the Legislature, and said tax imposed thereby, and made effective by the judgment of the court herein, is contrary to, and in violation of, Section 1, Article XIV of the Amendments to the Constitution of the United States, in this: That thereby a tax of one per cent. (1%) on the gross incomes of defendants in error, is imposed, while no like tax is imposed upon other persons or corporations in the State of Texas; and by Section 19 of Article VIII of the Constitution of the State of Texas, farm products for family and farming purposes, are exempted. Said tax therefore, imposes an unjust, unequal and arbitrary burden and discrimination upon and against defendants in error, and deprives them, and each of them, of the equal protection of the law.

7th. Said Act of the Legislature of the State of Texas, and the tax imposed thereby, and made effective by the judgment of the court herein, is violative of Section 10, Article 1 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, in this: That it appears upon the face of plaintiff's petition that defendants in error, and each of them, are corporations chartered under the laws of the State of Texas as common carriers of freight and passengers, with power to do and perform all and singular the acts and things usually incident to the
transaction of the business of a railway corporation; that
468 said charter constitutes and is a contract between the State of Texas and defendants in error, and each of them under which the State of Texas extended to them the privilege and franchise conferred in said charter; and that the tax imposed by said Act of the Legislature, and made effective by the judgment of the court herein, imposes upon defendants in error, and each of them, an unequal, unusual and confiscatory burden of taxation, such as was not contemplated by such charter contract, and operates to impair the obligation thereof.

8th. Said Act of the Legislature of the State of Texas, and the tax imposed thereby and made effective by the judgment of the court herein, is violative of Section 1, Article XIV of the Amendments to the Constitution of the United States, in that: It imposes upon defendants in error and other railway corporations in this State, a burden of taxation which is unequal, unreasonable and discriminatory, and such as is not imposed upon other persons or tax payers of the State of Texas, and deprives defendants in error, and each of them, of the equal protection of the law.

9th. Said Act of the Legislature of the State of Texas, and the tax imposed thereby, made effective by the judgment of the court herein, is in violation of the fourth paragraph of Section 8, Article 1 of the Constitution of the United States, which provides that, "Con-

gress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes," in this: That under the Constitution and laws of the State of Texas, and of the laws of the United States, defendants in error, and each of them, are authorized, empowered and required to connect with the railroads of other States, and defendants in error, and each of
469 them, are engaged in the transportation of inter-state and foreign commerce, and that they, and each of them, are, as shown by the facts herein, instrumentalities of inter-state commerce; and the tax levied by said Act, if considered as an occupation or a franchise tax, as held by the court herein, levies upon defendants in error, and each of them, a tax far in excess of, and in addition to, the regular ad valorem tax imposed under and by virtue of the general laws of the State of Texas, and constitutes thereby a regulation, obstruction, hindrance and interference with inter-state and foreign commerce.

10th. Said Act of the Legislature, and the tax thereby imposed, and made effective by the judgment of the court herein, is contrary to, and in violation of, said paragraph four, Section 8, Article 1, of the Constitution of the United States, in this: That it appears from the undisputed evidence herein, that defendants in error have always paid, and would pay for the year 1905, the taxes assessed against their property, at the same rate required of other property owners, which said property has been rendered and assessed and its tax value ascertained and equalized by the tax assessors and boards of equalization of the State, in the same manner that other property situated within the State, is assessed and taxed, in accordance with the Constitution and laws thereof; and that therefore, defendants in error cannot be subject to an additional tax in any form to which other property is not subject, or to which other property owners are not subject since defendants in error, and each of them, being engaged in inter-state and foreign commerce, and having been so engaged during the year ending June 30th, 1905, the same would therefore be a burden upon inter-state and foreign commerce, contrary to
470 that provision of the Constitution hereinabove set out.

11th. Said Act of the Legislature, and the tax imposed thereby, and made effective by the judgment of the court herein, is invalid and void, for that: Defendants in error herein, are railway companies, chartered as such, with property which can be devoted to no other use, and which are each compelled under the law to dedicate their said property to that use and no other; have had such property which includes their several franchises, fairly assessed and valued for taxation in the same proportion to actual value, as the property of other citizens of this State, and for the year 1905, and for all prior and succeeding years, have paid and are now paying the same ad valorem tax on such property as other citizens of the State, and in addition thereto, have, under the laws of this State, paid and are required to pay a specific franchise tax; and to impose upon such companies, under the guise of an occupation or franchise tax, a burden of taxation more than double that imposed under the regular ad valorem tax levied on the property of other citizens by

general law, and out of all due proportion to all other occupation taxes, operates to deprive them, and each of them, of their property without due process of law, and to deny to them, and each of them, the equal protection of the law; contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and to paragraph four, Section 8, Article 1, of the Constitution of the United States.

12th. Said Act of the Legislature of the State of Texas, and the tax imposed thereby, made effective by the judgment of the court herein, is invalid and void, for that: If considered as an occupation tax, it deprives the defendants in error, and each of them, of
471 their property without due process of law; contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, in this: That it exacts an occupation or franchise tax for the right of using property in pursuing the business for which it was specially chartered, and of using property constructed for a particular use, "without value for any other use, and which is compelled by the State of Texas to be used for such particular purpose and no other; the right to use such property inhering in such property itself; and defendants in error, and each of them, being compelled by law to use the property for the purpose of transporting freight, passengers and baggage, and performing all the duties of a common carrier, for the State of Texas to compel them to pay such franchise or occupation tax by a law imposed subsequent to its acceptance of its charter, and for the doing of an act which they are without liberty not to do, is to deprive them of their property without due process of law, and to deny them the equal protection of the law.

13th. Said Act of the Legislature of the State of Texas, the tax thereby imposed, and the judgment of this court enforcing the same, are in contravention of Section 1, of Article XIV, of the Constitution of the United States, in this: That it appears from the evidence that prior to June 30th, 1904, defendants in error, and each of them, were duly chartered and incorporated under the laws of the State of Texas, without the reservation of any authority upon the part of the State, or the Legislature of said State, to alter, amend or repeal their respective charters; and the uncontradicted evidence shows that each of the defendants in error, has for all years prior
472 to the year ending June 30th, 1904, and would for the year ending June 30th, 1905, and all successive years, pay the ordinary ad valorem taxes which for all of said years had been regularly levied, equalized and assessed against them, and each of them, as upon the property of all other citizens of the State of Texas; and that therefore, to impose the additional exorbitant and excessive taxes sought to be imposed by said Act, would deprive defendants in error of their property without due process of law, and would further operate to impair the obligations of defendants' charter contracts, in violation of paragraph one, Section 10, Article 1, of the Constitution of the United States, which provides that no State shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

14th. Said Act of the Legislature of the State of Texas, the tax therein levied, and the judgment of this court giving effect thereto, is in violation of said paragraph four, Section 8, of Article 1, of the Constitution of the United States, giving Congress the power to regulate commerce with foreign nations and among the several States, in this: That if the same shall be construed as an occupation or a franchise tax, it is imposed upon the occupation of engaging in and carrying on inter-state and foreign commerce, as well as the occupation of engaging in and carrying on State commerce; and in imposing an occupation or franchise tax for engaging in and carrying on inter-state commerce.

15th. Said Act of the Legislature of the State of Texas, the tax thereby imposed, and the judgment of the court enforcing the same, is violative of said Subdivision four, Section 8, of Article 1, of the Constitution of the United States, conferring upon Congress
473 the power to regulate commerce with foreign nations and among the several States, in this: That if regarded as imposing an occupation or franchise tax upon the business of engaging in and carrying on the business of inter-state and foreign commerce and the business of engaging in and carrying on the business of inter-state and foreign transportation and traffic and the business of engaging in and carrying on State commerce, said Act and the tax thereby levied, by reason of the indivisibility of the two kinds of business and the inseparability of the one business from the other, is void as a whole.

16th. Said Act of the Legislature of the State of Texas, the tax thereby levied, and the judgment of the court sustaining the same, is violative of said Subdivision four, Section 8, Article 1, of the Constitution of the United States, giving Congress the power to regulate commerce with foreign nations and among the several States, in this: That should the same be considered as imposing an occupation or franchise tax solely upon the occupation of engaging in and carrying on domestic or intrastate commerce, nevertheless, in arriving at the amount of said tax, the receipts of defendants in error, derives from inter-state and foreign transportation, must be taken as a basis, and the amount of the tax is measured by the receipts of the defendants in error from such interstate and foreign transportation, as well as those derived from State transportation and commerce, and thereby the tax is caused directly to relate to, fall upon, and immediately and directly affect interstate and foreign commerce, and the tax imposed, being equal to one per cent. (1%) of the gross receipts derived from such inter-state and foreign transportation, a burden is placed upon each of the defendants in error, directly proportioned to the amount of its inter-state and foreign business, and upon such inter-state and foreign commerce, and the same is therefore a regulation, hindrance, impediment and an
474 obstruction to, and a burden directly laid upon, said interstate and foreign commerce transacted by defendants in error.

17th. Said Act of the Legislature of the State of Texas, the tax thereby imposed, and the judgment of this court enforcing the same, are violative of said Subdivision four, Section 8, Article 1, of the

Constitution of the United States, conferring upon Congress the power to regulate commerce with foreign nations and among the several States, in this: That although same should be considered as levying a tax solely upon the occupation or franchise for doing business within the State of Texas, the burden thereof will necessarily fall upon the inter-state occupation, and since defendants in error cannot renounce their State occupation, but are each compelled by the laws of this State to pursue and engage in the same, whether they desire to do so or not, and cannot, under the laws of the United States, decline to pursue their inter-state occupation, the tax so levied must necessarily fall upon the inter-state occupation and business, and the receipts therefrom, and is therefore, necessarily, a regulation, impediment and hindrance of, and a burden upon, inter-state and foreign commerce.

18th. Said Act of the Legislature of the State of Texas, the tax thereby levied, and the judgment of this court enforcing the same, are violative of said paragraph four, Section 8, Article 1, of the Constitution of the United States, in this: That the tax attempted to be levied, is, in fact, a tax upon the income of railway corporations, derived from inter-state and international commerce, and is therefore, a regulation thereof.

19th. Said Act of the Legislature of the State of Texas, the tax thereby imposed, and the judgment of this court enforcing the same, are in violation of Section 1, of the Fourteenth Amend-
475 ment to the Constitution of the United States, which provides that no State shall deprive any person within its jurisdiction, of the equal protection of the law, in this; That said Act, as construed, sustained and enforced by this court, is held to be imposed as an occupation or franchise tax upon the intra-state business, and under the terms of said Act, the various railway companies subject thereto, are required to pay a tax based upon their earnings, not only from the business taxed, but also upon their inter-state business and international business and commerce; and the evidence herein shows that the earnings of the various railway companies of this State, derived from intra-state business, as compared with the total amount of their gross receipts from inter-state and international business, vary so greatly that the effect of the enforcement of the Act, as construed by the court, would be to require different railway companies of this State to pay different percentages on their receipts from State business for the right to pursue such business; it being a denial of the equal protection of the law to compel one railway company which does a small intra-state business, to pay an equal or a larger tax than a railway company situated in the same State, which does a far greater State business, for the privilege of pursuing the same business, solely by reason of the fact that the first company does a larger inter-state and foreign business—is a denial of the equal protection of the law.

20th. Said Act of the Legislature of the State of Texas, the tax thereby imposed, and the judgment of this court sustaining the same, are in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, providing that no
476 State shall deprive any person within its jurisdiction, of the equal protection of the law, and that no person shall be de-

prived of his property without due process of law, in this: That the uncontradicted evidence shows that defendants in error have no assets or property that have not heretofore been subject to taxation, and they, and each of them, have paid the taxes thereon in the same proportion as other property and taxpayers in the State have been required to pay, and the imposition of the tax provided for in said Act, is an unjust, arbitrary and confiscatory burden laid upon defendants in error.

21st. Said Act of the Legislature of the State of Texas, the tax thereby imposed, and the judgment of the court sustaining the same, are violative of the Constitution and laws of the United States, in this: That it levies a tax directly upon the receipts of defendants in error from the Government of the United States for the transportation of United States mails.

Second.

The court erred, in rendering judgment for any amount whatsoever, against either of these defendants, and in holding that the Act of the Legislature, approved April 17th, 1905, hereinabove referred to, was not an interference with inter-state commerce, and as such, in violation of Paragraph four, Section 8, Article 1, of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian Tribes.

Third.

The court erred, in rendering judgment for any sum whatsoever, against the defendants in error, and each of them, and
477 in holding that the Act of the Legislature hereinabove referred to, and the tax thereby imposed, were not in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction, the equal protection of the law.

Fourth.

The court erred, in rendering and entering any judgment whatsoever, against these defendants in error, or either of them, and in holding that said Act of the Legislature and the tax thereby imposed, did not violate the obligations of the charters of defendants in error, and each of them, in violation of Paragraph one, Section 10, Article II, of the Constitution of the United States, prohibiting any State from passing any law impairing the obligation of contracts.

Fifth.

The court erred, in holding that the tax herein sought to be recovered by the State of Texas, being that imposed by the Act of the Legislature of the State of Texas, approved April 17th, 1905, by plaintiff in its petition declared upon, is not a tax levied directly

upon the receipts of defendants in error and other railway corporations in the State of Texas from inter-state and foreign commerce, and in not holding that said tax is a tax levied directly upon such receipts, and therefore, in violation of Paragraph four, Section 8, Article I, of the Constitution of the United States.

Sixth.

The court erred, in not holding that the tax herein levied,
478 is measured by the receipts of defendants in error, and other railway corporations in this State, from the transportation of freight, passengers and baggage alone as held by the trial court; and in holding that the same should be measured by the receipts of said companies from all sources whatsoever; and erred, in rendering and entering judgment for 169/365 of one per cent. (1%) of the receipts of defendants in error from all sources whatsoever, instead of that proportion of its receipts from the transportation of freight, passengers and baggage.

Seventh.

The court erred, in failing to consider and in failing to sustain the assignment of error, to the effect that the Texas & Pacific Railway Company which is, and has been, in active competition with defendants in error in the transportation of freight and property, State and inter-state, having a charter granted by the Government of the United States, cannot be subjected to the tax in question; hence the tax in question, not applying to the said Texas & Pacific Railway Company, and being held by the court to be an occupation tax, is not equal and uniform, as required by the Constitution of the State of Texas, in that, it does not apply to all of the same class of subjects.

Eighth.

The court erred, in rendering judgment for the State, because if the gross receipts tax is imposed only upon the intra-state occupation of defendants in error, the same is nevertheless invalid and contrary to the clause of the Federal Constitution, conferring upon Congress the right to regulate inter-state commerce, for it undertakes to arrive at the amount of the tax by the assessments of a sum equal to one per cent. (1%) of the gross receipts derived from all sources
479 whatsoever, including receipts from inter-state and foreign commerce; and for the reason that in fixing an occupation tax, the State cannot tax inter-state commerce indirectly, which it has no power to tax directly.

Ninth.

The court erred, in its opinion and conclusion, because the effect of the tax in question being to regulate and impose a burden on inter-state commerce, the same cannot be reconciled to the provision of the Constitution of the United States, conferring on Congress the power to regulate such commerce, by merely assuming

it to be or calling it a tax on a State occupation—the substance, and nor the form or the name, should be regarded.

Tenth.

The court erred, in its opinion and conclusion, because the assessment of the tax as a sum equal to one per cent. (1%) of the gross inter-state earnings of the defendants in error, is in effect an impediment and serious obstruction to it, and therefore, a burden upon inter-state commerce, as the defendants in error, in fixing inter-state rates, will necessarily consider that from the earnings of all such freight carried, they must yield the State one per cent. (1%); and because if it would be admitted that the State could so demand one per cent., it could demand any larger percentage, and under this form of taxation, the State may practically without limit, regulate or suppress inter-state commerce; contrary to the clause of the Federal Constitution, conferring the power to regulate such commerce upon Congress.

Eleventh.

The court erred, in overruling the First Assignment of
480 Error, which is as follows:

"The court erred in overruling the defendants' general demurrer to the plaintiff's petition."

Twelfth.

The court erred, in overruling the Second Assignment of Error, which is as follows:—

"The court erred in overruling subdivision 2 of defendants' special exception III to plaintiff's petition, which was as follows:

'Said Act of the Legislature, in said petition referred to, is unconstitutional and void, for that the same is in conflict with, and in contravention to, the third paragraph of Section 8, Article 1, of the Constitution of the United States, which provides 'that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian Tribes', in this, that said Act seeks to levy, and does levy, a tax directly upon defendants' receipts from inter-state and foreign commerce, and regulates, obstructs and hinders commerce between the several States and with foreign nations.'"

Thirteenth.

The court erred, in overruling the Third Assignment of Error, which is as follows:—

"The court erred in overruling subdivision 3 of defendant's special exception III to plaintiff's petition, which was as follows:

'That said Act is violative of, and in contravention of, the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws, in this, that said

Act provides that the taxes herein levied shall be in addition
481 to all other taxes levied by law, and the court being judicially informed that the property of this defendant has been, and is now, assessed for taxation upon an ad valorem basis and rate, as all other citizens of the State of Texas, to now levy upon it an additional tax of one per cent. upon its gross receipts, when a like tax is not levied upon other citizens of the State of Texas, *in* an unequal, unjust and arbitrary discrimination in taxation against this defendant, contrary to said Section 1, Article 14 of the Amendments to the Constitution of the United States.

Fourteenth.

The court erred, in overruling the Seventh Assignment of Error, which is as follows:—

"The court erred in overruling subdivision 7 of defendant's special exception III to plaintiff's petition, which was as follows:—

'Said Act is in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, providing that no State shall deny to any person within its jurisdiction the equal protection of the law, in this, that this defendant and other railroad companies are selected from among the masses of persons and property in the State, and certain taxes are imposed upon it, which are not imposed upon other persons and property in the State, and the reports of certain persons, officers and agents, required by said Act, are given the effect of an absolute assessment of said property for taxation; whereas, under the laws of said State of Texas, no tax of the same or similar nature is imposed upon other persons and corporations, and the property of all other persons and corpora-
482 tions is assessed in proportion to its value, and not at an absolute, fixed and mathematical sum, to be arbitrarily determined by a single officer, to-wit, the Comptroller of the State of Texas.'"

Fifteenth.

The court erred in overruling the Fourteenth Assignment of Error, which is as follows:—

"The court erred, in overruling subdivision 22 of defendant's special exception III to plaintiff's petition, which was as follows:—

'Said tax, imposed in said Act, is violative of Section 1, Article XIV of the Amendments to the Constitution of the United States, in this, that it deprives defendant of the equal protection of the law, no like income tax being imposed upon other persons and corporations in said State.'"

Sixteenth.

The court erred, in overruling the Fifteenth Assignment of Error, which is as follows:—

"The court erred in overruling subdivision 23 of defendant's special exception III to plaintiff's petition, which was as follows:

'That said tax, imposed by said Act of the Legislature, denies defendant the equal protection of the law, contrary to said Section 1,

Article XIV, of the Amendments to the Constitution of the United States, in this, that thereby a tax of one per cent. on its gross income is imposed, while no like tax is imposed upon other persons and corporations in said State; and by Section 19 of Article VIII of the Constitution of Texas, incomes from lands used for farming purposes are exempted.'"

483

Seventeenth.

The court erred, in overruling the Sixteenth Assignment of Error which is as follows:—

"The court erred in overruling subdivision 24 of defendant's special exception III to plaintiff's petition, which was as follows: 'That said Act is violative of Section 10, Article 1, of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, in this, that it appears from the face of plaintiff's petition, that defendant is a corporation chartered under the laws of the State of Texas, as a common carrier of freight and passengers, with the power to do and perform all and singular the acts and things usually incident to the transaction of the business of a corporation; that said charter constitutes, and is, a contract between the State of Texas and defendant, under which the State of Texas extended to it the privilege and franchises conferred in said charter, and that the imposition of an unequal, unusual and confiscatory burden of taxation, imposed by said bill, is such as was not contemplated in such contract, and operates to impair the obligation thereof.'"

Eighteenth.

The court erred in overruling the Eighteenth Assignment of Error, which is as follows:—

"The court erred in overruling subdivision 28 of defendant's special exception III to plaintiff's petition, which was as follows:— 'That it appears upon the face of said Act, and of plaintiff's petition, that same is violative of Section 1 of Article XIV of the Amendments to the Constitution of the United States, in
484 this, that it imposes upon this defendant, and other railway corporations similarly situated, a burden of taxation which is unequal, unreasonable and discriminatory, and such as is not imposed upon other persons, citizens or tax payers of the State of Texas, and therefore, deprives defendant of the equal protection of the law.'"

Nineteenth.

The court erred, in overruling the Nineteenth Assignment of Error, which is as follows:—

"The court erred in overruling subdivision 29 of defendant's special exception III to plaintiff's petition, which was as follows: 'Under the Constitution and laws of the State of Texas and of the laws of the United States, defendant is authorized, empowered and required to connect with railroads of other States, and is engaged in the transportation of inter-state and foreign commerce,

and as such, is an instrumentality of inter-state commerce; and the Act alleged, if considered as an occupation or privilege tax, levies on defendant a tax far in excess of, and in addition to, the regular ad valorem tax imposed under the general laws of the State of Texas, and is a regulation, hindrance and obstruction to inter-state commerce, contrary to the third paragraph of Section 8, Article 1, of the Constitution of the United States, which provides that 'Congress shall have power to regulate commerce with foreign nations and among the several States and with Indian Tribes.'"

Twentieth.

The court erred, in overruling the Twentieth Assignment of Error, which is as follows:—

"The court erred in rendering any judgment whatsoever,
485 against the defendant for any portion of the taxes sought to be imposed by said Gross receipts Tax Bill, for the year 1905."

Twenty-first.

The court erred, in overruling the Twenty First Assignment of Error, which is as follows:—

"The court erred in not rendering judgment for the defendant upon the trial of said cause."

Twenty-second.

The court erred, in overruling the Twenty Second Assignment of Error, which is as follows:—

"The court erred in rendering judgment for the plaintiff for any amount, for it appeared from the uncontroverted evidence, that a large part of the receipts of the defendant, for the year ending June 30th, 1905, upon which the tax awarded the plaintiff by the judgment, was based, were receipts derived by the defendants from the transportation of freight, passengers, baggage, mail and express between points in different States and Territories of the United States, and between points in the United States and foreign countries, such receipts thus being derived from commerce among the States and foreign countries, and such transportation being commerce between the States and foreign countries; and the court having held that the Act of the Legislature applies to such inter-state and international receipts, and as applied to the same, the said Act being in contravention of the clause of the Constitution of the United States, conferring upon Congress the authority to regulate commerce among the States and with foreign countries, the court should have held that the Act was void, there being no pro-
486 vision in the Act for the assessment or collection of the tax on receipts only from transportation and other sources within the State."

Twenty-third.

The court erred, in overruling the Twenty Third Assignment of Error, which is as follows:—

"It appears from the uncontroverted evidence that a large part

of the receipts of the defendant were derived from inter-state and international transportation, and the Act of the Legislature, as construed by the court, applies to, and levies a tax upon, such receipts in a sum equal to one per cent. thereof, which is, in effect, a regulation of inter-state and foreign commerce, contrary to the clause of the Constitution of the United States, conferring power to regulate such commerce upon Congress; therefore, the court erred in including in its judgment a sum equal to 169/365 of one per cent. of such receipts so derived from international and inter-state commerce."

Twenty-fourth.

The court erred, in overruling the Twenty Fourth Assignment of Error, which is as follows:—

"It appearing from the evidence that some of the items of the receipts of the defendant for the year ending June 30th, 1905, from transportation, could not be divided between State and inter-state and international commerce, the court erred in including in its judgment in favor of the plaintiff, a sum equal to 169/365 of one per cent. of such receipts."

Twenty-fifth.

The court erred, in overruling the Twenty Fifth Assignment of Error, which is as follows:—

"The court erred in rendering judgment for the plain-
487 tiff, because it appeared from the undisputed evidence that the defendant has always paid, and will pay for the present year, the taxes assessed against all its property at the same rate required of other property, which property has been rendered and assessed and its tax value ascertained and equalized by the tax assessors and boards of equalization of the State, in the same manner as such other property situated within the State, and in accordance with the Constitution and laws of the State; and therefore, defendant cannot be subjected to an additional tax in any form, to which other property is not subjected, or to which other property owners are not subjected, since defendant, being engaged in inter-state and foreign commerce, and having been so engaged during the year ending June 30th, 1905, and since same would be a burden upon inter-state and foreign commerce, contrary to the Constitution and laws of the United States."

Twenty-sixth.

The court erred, in overruling the Twenty Sixth Assignment of Error, which is as follows:—

"The court erred in rendering judgment for the plaintiff, because where, as it here appears, a railway company chartered as such, the property of which can be devoted to no other use, and which is compelled under the law, to dedicate its property to that use and no other, has had that property, which includes its franchise, fairly assessed and valued for taxation in the same proportion to actual value as the property of other citizens of the State, and is

now paying the same ad valorem tax on such property as other citizens of the State, and in addition thereto, has paid a specific franchise tax—to impose upon such company under the
488 guise of an occupation tax or otherwise, a burden of taxation more than double that imposed under the regular ad valorem tax levied on the property of all other citizens by general law, and out of all due proportion to all other occupation taxes, is to deprive it of its property without due process of law, and to deny it the equal protection of the law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States."

Twenty Seventh.

The court erred, in overruling the Twenty Seventh Assignment of Error, which is as follows:—

"The court erred in rendering judgment for the plaintiff, because the tax imposed, if considered as an occupation tax, deprives defendant of its property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, in this, that it exacts an occupation tax for the right to use property constructed for particular use, and without value for any other use, and compelled by the State to be used for that particular purpose, and no other—the right to use such property inhering in the property itself, and the State being without power to exact license or occupation tax therefor."

Twenty Eighth.

"The court erred, in overruling the Twenty Eighth Assignment of Error, which is as follows:—

"The court erred in rendering judgment for the plaintiff, after holding the tax in question to be an occupation tax, because it appeared from the uncontradicted evidence that during the year ending June 30th, 1905, and before and since that time, that a large part of the commerce of the State of Texas was conducted
489 by common carriers by water, in competition with defendant and other common carriers, by rail, and that such competition by common carrier by water was, and is, real and substantial, and to a very large extent affected the rates that were charged and could be charged by defendant and other common carriers by rail; and as the Act of the Legislature in question does not impose, and as no other Act of the State of Texas, imposes a similar tax on such common carriers by water, therefore, the said Act of the Legislature, attempting to impose the tax in question upon defendant and other rail carriers, was, and is, repugnant to the Constitution of the State of Texas, Section 2, Article VIII, wherein it is provided that occupation taxes shall be equal and uniform upon the same class of subjects."

Twenty Ninth.

The court erred, in overruling the Thirtieth Assignment of Error, which is as follows:—

"The court erred in rendering judgment for the plaintiff, because

it appeared from the evidence that, prior to June 30th, 1904, defendant was duly chartered and incorporated under the laws of the State of Texas, without reservation of the authority on the part of the State, or the Legislature of said State, to alter, amend, or repeal the charter of the defendant; and it appeared that the defendant has heretofore paid and will pay the taxes as specified in the foregoing Twenty Fifth and Twenty Sixth Assignments; therefore, to impose the additional exorbitant and excessive tax sought to be imposed by the Act now in question, would impair the obligation of defendant's charter contract, contrary to the Constitution of the United
490 States and of the State of Texas, each of which prohibits the Legislature of the State of Texas, or any authority purporting to act thereunder, from passing any law or doing any act, the effect of which would be to impair the obligation of a contract, and would deprive the defendant of property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, and of the Bill of Rights of the Constitution of the State of Texas."

Thirtieth.

The court erred, in overruling the Thirty Third Assignment of Error, which is as follows:—

"The court erred in rendering judgment for the plaintiff, because if the tax levied by the Act in question be considered as an occupation tax, it is imposed upon the occupation of engaging and carrying on inter-state and foreign commerce, as well as the occupation of engaging in and carrying on State commerce; and in imposing an occupation tax for engaging in and carrying on inter-state commerce, it is in violation of subdivision 3 of Section 8, of Article 1, of the Constitution of the United States, giving Congress the power to regulate commerce with foreign nations and among the several States."

Thirty First.

The court erred, in overruling the Thirty Fourth Assignment of Error, which is as follows:—

"The court erred in rendering judgment for the plaintiff, because, if regarded as imposing an occupation tax upon both the business of engaging in and carrying on inter-state and foreign commerce, and the business of engaging in and carrying on State commerce,
491 the act in question, by reason of the indivisibility of the two kinds of business, and the inseparability of the one business from the other, is void as a whole."

Thirty Second.

The court erred, in overruling the Thirty Fifth Assignment of Error, which is as follows:—

"The court erred in rendering judgment for the plaintiff, because, if the Act in question be considered as imposing an occupation tax solely upon the occupation of engaging in and carrying on State commerce, it is nevertheless, in violation of subdivision two of Sec-

tion 8, of Article 1, of the Constitution of the United States, conferring upon Congress the power to regulate commerce with foreign nations and among the several States; since, in arriving at the amount of the tax, the receipts derived from inter-state and foreign transportation, as well as those derived from State transportation, must be taken as a basis, thereby causing the tax to directly relate to and affect inter-state and foreign commerce; and since the imposition of a tax equal to one per cent. of the gross receipts derived from inter-state and foreign transportation, is an impediment and obstruction to, and a burden upon, inter-state and foreign commerce."

Thirty Third.

The court erred, in overruling the Thirty Sixth Assignment of Error, which is as follows:—

"The court erred in rendering judgment for the plaintiff, because, if the Act in question be considered as levying a tax solely upon the occupation to do business within the State, it is nevertheless, in violation of subdivision three of Section 8, of Article 1, of the Constitution of the United States, conferring upon Congress the power
492 to regulate commerce with foreign nations and among the several States, in that, the burden of the same will necessarily fall on the inter-state occupation, since defendant cannot renounce its State occupation and pursue only its occupation as carrier of inter-state and foreign commerce."

Thirty Fourth.

The court erred, in overruling the Fortieth Assignment of Error, which is as follows:—

"The court erred in rendering judgment for the plaintiff, because the tax attempted to be levied by the Act in question, is in fact, a tax upon the income of railroad corporations, derived from inter-state and international commerce; and as such, is a regulation of such commerce, in violation of the third paragraph of Section 8, Article 1, of the Constitution of the United States."

Thirty Fifth.

The court erred, in overruling the Forty Second Assignment of Error, which is as follows:—

"The court erred in rendering judgment for any sum in behalf of the State, after holding that said Act imposed an occupation tax for pursuing the business for the carriage of passengers, freight, baggage, mail and express within the State of Texas, because under the terms thereof, the various railroads subject thereto would be required to pay a tax based upon their earnings from both intra-state and inter-state, and international commerce, and the evidence in the case shows that their earnings, derived from intra-state business, as compared with the total amount of their gross receipts from inter-state and in-

ternational business, varies so greatly that the effect would be
493 to require different railroad companies to pay different percentages on their gross receipts from State business, which is in violation of Section 2, Article VIII, of the Constitution of the State of Texas, and in violation of that part of Section 1, of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person within its jurisdiction of the equal protection of the law."

Thirty Sixth.

The court erred, in overruling the Forty Third Assignment of Error, which is as follows:—

"The court erred in holding the Act of the Twenty-Ninth Legislature, in controversy, to be constitutional, and in rendering judgment in behalf of the State, because the evidence shows that the defendant has no assets or property that has not heretofore been subject to taxation, and shows that it has paid its taxes thereon in the same proportion as other property and tax payers of the State have been required to pay, and the imposition of the tax provided for in said Act is therefore an unjust and an arbitrary burden laid upon the defendant, in violation of Section- 1 and 2 of Article VIII, of the Constitution of the State of Texas; and of that portion of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person within its jurisdiction, of the equal protection of the law, and that portion thereof which provides that no person shall be deprived of his property without due process of law."

Thirty Seventh.

The court erred, in overruling the Forty Fourth Assignment of Error, which is as follows:—

494 "The court erred in rendering judgment for the plaintiff, because the Act in controversy is contrary to and in violation of Section 35, Article 3 of the Constitution of the State of Texas, which provides that the subject of every bill shall be expressed in its title, in this, that the caption of the said Act does not include or express in its provisions the subjects of taxing a railroad having a line of railway both within and without the State of Texas, and as the body of said Act contains a provision for taxing a railway company having a line of railway within and without the State of Texas, it includes a subject which is not expressed or referred to in the title thereof, and is therefore, unconstitutional and void; and if it be held under this Assignment of Error that the Act is constitutional as to railway companies having lines partly within and partly without the State of Texas, then it must be held as unconstitutional and void as to this defendant, because same would be in violation of Section 2 of Article VIII of the Constitution of the State of Texas, requiring that all occupation taxes shall be equal and uniform on the same class of subjects."

Counsel for plaintiff in error are Honorable R. V. Davidson, Attorney General of the State of Texas, and Honorable W. E. Hawkins,

Assistant Attorney General of the State of Texas, each of whom resides in the City of Austin, Travis County, Texas.

Respectfully submitted.

495 BAKER, BOTTS, PARKER & GARWOOD,
J. W. TERRY,
N. A. STEDMAN,
Attorneys for Defendants in Error.

Notice of the filing of the above and foregoing Motion for Rehearing is waived, together with service of copies thereof.

R. V. DAVIDSON,
Attorney General,
WM. E. HAWKINS,
Assistant Attorney General, Attorneys for Plaintiff in Error.

(Endorsed:) Mo. No. 1598. No. 1,594. The State of Texas, Plaintiff in Error, *versus* Galveston, Harrisburg & San Antonio Railway Company, *et al.*, Defendants in Error. Submitted Nov. 28, 1906. Motion of Defendants in Error for Rehearing. Filed in Supreme Court Nov. 17, 1906. F. T. Connerly, Clerk. By J. S. Myrick, Deputy. Overruled 12/5/06.

496 *Motion of Plaintiff in Error for Rehearing and for Amendment of Judgment.*

Filed November 21, 1906.

No. 1594.

In the Supreme Court of Texas.

THE STATE OF TEXAS, Plaintiff in Error,
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL., Defendants in Error.

Motion for Rehearing and for Amendment of Judgment.

Now comes the State of Texas, plaintiff in error, in the above entitled cause, and moves the court to grant the said plaintiff in error a rehearing in said cause, and to modify and amend its opinion and judgment heretofore entered in this cause in such manner as to allow and give to said plaintiff in error the ten per cent. penalties prayed for in its original petition in this cause, and in support of this motion respectively shows:

The Supreme Court erred in not sustaining plaintiff in error's eighth cross-assignment of error, which was as follows:

"The court erred in not rendering judgment in favor of plaintiff against defendant for the full amount of penalties prayed for in plaintiff's petition."

This suit is based upon Chapter 141 of the General Laws passed by the Twenty-ninth Legislature.

At the threshold of this discussion we respectfully call to the attention of this Honorable Court the following portions of the statute under consideration:

"SEC. 2. For the purpose of determining the amount of such tax, the president, vice president, general manager, treasurer or superintendent of such railroad corporation, or the receiver thereof, or such other person, firm or association of persons shall, on or before the first day of October, 1905, and annually thereafter, report to
497 the Comptroller of Public Accounts, under oath, the gross receipts of such line of railroad, from every source whatsoever, for the year ending on the 30th day of June last preceding, and shall immediately pay to the State Treasurer the annual tax herein imposed, calculated on the gross receipts so reported. The Comptroller shall have power to require such other reports and affidavits as may in his judgment be necessary to protect the interests of the State, and he shall estimate such tax on the true gross receipts thereby disclosed, and assess and enforce the collection of such tax."

"SEC. 4. Should such report not be filed with the Comptroller and the annual tax thereon estimated paid to the Treasurer on or before the first day of October of any year, a penalty of ten per centum upon the amount of such tax shall accrue thereon and be added thereto; and in case such report is not made or such tax and penalty thereon are not paid on or before the first day of November thereafter, or in case of a failure to furnish the additional report or affidavit required by the Comptroller for a longer period than thirty days after demand therefor, or in case of failure to pay within thirty days any tax or additional tax assessed by the Comptroller under this Act, every such railroad corporation or receiver thereof, or every such person, firm or association of persons shall forfeit and pay to the State the sum of two hundred dollars for each day any of said reports or payment be delayed after the expiration of such periods, respectively."

The penalties and forfeitures imposed or sought to be imposed by the statute are as follows:

First. Ten per centum upon the amount of such tax if the report is not filed with the Comptroller and the tax paid on or before the first day of October of any year.

Second. A forfeiture to the State of two hundred dollars per day for failure to make such report or pay such tax before the first day of November of any year, or for failure to furnish additional reports or affidavits required by the Comptroller for a longer period than thirty days after demand therefor, or for failure to pay within thirty days any tax or additional tax assessed by the Comptroller under this Act.

This last provision refers to the tax which the Comptroller may assess, based upon additional reports and affidavits which he may call for under Section 2 of the Act, those being the only instances in which the Comptroller is directed to make any assessment whatever.

It is manifest from the reading of the foregoing sections of the law

that the "Penalty" of ten per cent. is wholly distinguished
498 from the "forfeitures" of two hundred dollars per day, and is for the failure of the taxpayer to comply with the law in making his report and paying his tax on or before the first day of October of any year.

In other words, the statute is very clear that the taxpayer shall pay a ten per cent. penalty for failure to do either of two things at a certain time, to-wit, make the report or pay the tax on or before October first of any year.

In this case, the status as it existed at close of business on October 1st, 1905, must determine whether or not the ten per cent. penalty accrued, assuming its constitutionality.

We respectfully contend that this penalty of ten per cent. is not only moderate and reasonable as to amount, but that, being a fixed percentage of the tax, it is without objection as to uniformity, is proportionate to the amount of the tax, and is a penalty, which cannot be successfully questioned as not in all respects valid and constitutional.

The said penalty of ten per cent. and the said forfeiture of two hundred dollars per day, it will be observed, are not for a failure to do the same thing exclusively, or at the same time, and are not in any degree intended as a punishment for a failure to comply with the same provisions of the law, but are distinct and separate punishments for distinct and separate failures to comply with different requirements of the statute.

As we understand the opinion of this court, two reasons are therein given in support of the conclusion that the penalties cannot be collected: one being that the state was demanding as taxes amounts in excess of those prescribed by law, the other being that the penalties claimed by the state aggregate a vast amount which is not proportionate to the amount of the tax fixed by law.

We therefore submit the following propositions, viz:

First Proposition.

499 The fact that the state, through its officers, was demanding a greater amount of taxes than was prescribed by law did not relieve the taxpayers from the statutory duty of tendering the proper amount; and upon their failure to do so on October 1st 1905, the ten per cent. penalty accrued.

Statement.

Section- 2 and 4 of the statute, *supra:*

The original petition in this cause embraced said ten per cent. penalty against each of the defendants in error. Each was liable for the tax prescribed in said statute, as shown by its report of gross receipts. (Rec. pp. 80-85-90-96.)

The taxes prescribed by said statute were not paid when due and have never been paid. (Rec. p. 102.)

Said Eighth Cross Assignment of Error was duly filed in the District Court, (R. p. 189) and was duly presented to the Court of

Civil Appeals in our brief, (page 56) and in our motion for a rehearing in that court, and was also duly presented in our application for a writ of error.

Authorities.

Nalle *vs.* City of Austin, 91 Texas, 426;
City of Marshall *vs.* Snediker, 25 Texas, 471;
San Antonio *vs.* Berry, 92 Texas, 325;
G. & W. Ry. Co. *vs.* City of Galveston, 96 Texas, 520;
State Tax on Railroads, 92 U. S., 575;
Mackey *vs.* San Francisco, 113 California, 402;
De Fremery *vs.* Austin, 53 California, 380;
Bank of Mendocino *vs.* Chalfant, 51 Cal., 369.

Remarks.

The fact that the State Treasurer or any other officer of the state government might have demanded of the taxpayer more than this Honorable Court finds the taxpayer owed, did not, as we understand the law, relieve the taxpayer from the duty of tendering what he did owe and what this court finds he should have paid.

While the statute under consideration does not authorize the Comptroller to make an assessment, and therefore there was no
500 record at any time in the possession of the Treasurer which obligated him to conform in every respect to the voluntary certificate of the Comptroller as to the amount of the tax, yet, if such has been the case, the Treasurer would have been in position similar to the collector of a county or a municipality demanding the taxes of a taxpayer upon assessment rolls placed in his hands by the assessor.

For example: suppose the collector of the county of Travis finds upon his rolls an assessment against a taxpayer of the county for a certain sum—we will say for fifty dollars—and demands of the taxpayer the payment of the tax. The taxpayer disputes the tax in whole, and litigation is the result of the demand and refusal to pay this tax. The courts find that the taxpayer did not owe the fifty dollars, but owed only thirty dollars, "the legal and the illegal parts being capable of definite ascertainment," and also that the tax collector had no authority under the assessment rolls to receive the thirty dollars. Then the question is, could the penalty of ten per cent. provided by our ad valorem tax laws be embraced in the judgment of the court for this thirty dollars of taxes?

We take it that there is no question but that the ten per cent. would be included, and that the contention, if it should be made, that the taxpayer did not tender the thirty dollars because the tax collector could not receive it could not successfully be maintained.

Our assumed case above appears to us to be like the case under consideration, even assuming that the State Treasurer had in his possession an assessment roll, which, in fact, he did not have, in the case now before the court, none being required or provided by law. The case at bar being under a statute levying an occupation

tax, is a stronger case for the state. Insurance Co. *vs.* State, 42 Tex., 638.

In the opinion of this Honorable Court in Nalle *vs.* vs.
501 City of Austin, 91 Texas, 426, we find the following:

"A sale made, in the summary manner usual in collecting taxes, for a sum exceeding that which is a lawful claim against the property has been held by this court to be void; but we are of opinion that when suit is instituted by a city or county for the recovery of a tax due to it, and it is found that such tax is in part lawful and in part illegal, if the legal and illegal parts are capable of definite ascertainment and apportionment, a court will apportion the taxes and give judgment for that part which lawfully might have been levied. State *vs.* McClurg, 3 Dutcher's Rep. (N. J. L.), 258; Allen *vs.* Peoria R. R. Co., 44 Ill. 85; People *vs.* Nichols, 49 Ill., 517; Briscoe *v.* Allison, 43 Ill., 291; L. & N. R. R. Co. *vs.* McKenna, 7 Lea (Tenn.) 313; B. & M. R. Railroad Company *v.* New York County, 7 Neb., 494; Palmer *v.* Township of Napoleon, 16 Mich., 176, De Fremery *v.* Austin, 53 Cal., 380; Mills *v.* Charlton, County Treasurer, 29 Wis., 400. If the entire levy of this tax were void, the court could not make a levy of what the city council should have levied—but being in part valid, it was within the power of the court to enforce the city's claim to the extent that it was lawful and to refuse to give judgment for that which was unlawful."

The State Railroad Tax Cases, reported in 92 U. S., 575 were brought to restrain the collection of certain taxes under an Illinois statute. In its decision of those cases the Supreme Court of the United States said: "It is not sufficient to say in the bill, that they (complainants), are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due or what can be seen to be due on the face of the bill or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not thus to be tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the
502 condition annexed of a receipt in full for all the taxes assessed.

"We are satisfied that an observance of this principle would prevent the larger part of suits for restraining the collection of taxes which now come into the courts. We lay it down with unanimity, as a rule to govern the courts of the United States in their action in such cases"; citing numerous authorities.

Among the grounds given by the District Court in support of its judgment in the case at bar, as stated by this Honorable Court, we find the following:

"The Treasurer of the State was not authorized to receive less than the sum assessed by the Comptroller, hence, the railroads could not pay the sum actually due, and a tender of what the Treasurer could not accept would have been useless."

The conclusion that "the treasurer of the state was not authorized to receive less than the sum assessed by the Comptroller," appears

to us to be erroneous, in view of the fact that said statute makes no provision whatever for assessment by the Comptroller, except in cases where he requires additional reports and affidavits under the provisions of Section 2, and none was required in this case.

The law makes no provision for any certificate or report from the Comptroller to the State Treasurer of the proper amount of the tax.

The "assessment" in the ordinary case, (that is, when no additional report or affidavit is required by the Comptroller) is made by the very terms of the statute itself, and not by the Comptroller or any other officer.

The statute imposes upon the taxpayer the duty of paying to the State Treasurer the amount of taxes imposed by law, calculated upon the gross receipts as shown by the report submitted to and approved by the Comptroller. Upon the approvel of the report by the Comptroller, the duty of the taxpayer to pay the tax
503 arises, without assessment by or certificate from the Comptroller. Texas Banking & Insurance Co. *vs.* State, 42 Tex., 638.

However, the Comptroller did furnish to the State Treasurer a certificate which correctly showed the gross receipts reported and approved as by law required, and also the amount of the tax under his construction of the statute. That construction as to amount of the tax was erroneous, as decided by this court; but in all other respects the certificate was correct. The amount of such gross receipts, as reported by the taxpayer and approved by the Comptroller, was peculiarly within the knowledge of the taxpayer, independent of said certificate of the Comptroller and upon that knowledge, (even had no certificate been given by the Comptroller), the taxpayers could, in contemplation of law, have ascertained and calculated the proper amount of the tax, and have tendered the same to the State Treasurer.

The opinion of the Supreme Court of California in the Mackey case, *supra* is so much in point that we quote from it as follows:

"The only other question made by appellants relates to the penalty for delinquency. It is contended that as the Act of 1893, (Stats. 1893, p. 32), which constitutes a new section of the Political Code, numbered 3819, was not in force when these taxes became delinquent, that they are entitled to recover the whole of the penalty paid, for the reason, as they claim, that prior to the passage of said act, they could not pay under protest until a sale was threatened; and cite Williams *v.* Corcoran, 46 Cal., 556.

"If the illegal part of the tax had been incapable of separation from the legal part, this contention should be sustained. The written protest made by appellants to the tax collector, however, shows the facts upon which such separation could readily have been made. It showed that said bonds were assessed at $1,915,000, that the state board of equalization increased that assessment
504 twenty per cent., or $383,000, and the rate of taxation for state purposes as well as for county purposes being known, there could have been no difficulty in ascertaining the amount

legally assessed, and we think it was appellants' duty to have tendered that amount; and under the plain provisions of section 9 of article XIII of the constitution, which provides 'that no board of equalization shall raise any mortgage, deed of trust, contract, or other obligation by which a debt is secured money or solvent credits, above its face value,' it would have been the duty of the tax collector to have received it. If such tender had been made before delinquency, and the tax collector had refused to receive the amount so tendered, and the penalty for delinquency had been afterward added and paid under protest for the protection of the property of the estate, the case would have been different. It is true that appellants in their protest claimed that the bonds were not taxable at all, but they also inserted a separate clause alleging the raise made by the state board, the amount of it, and that it was unauthorized under the above quoted provision of the constitution. In De Fremery *v.* Austin, 53 Cal., 380, it was held that if a tax levy contained an illegal item, such item will not invalidate the levy as to other items, if the levy is so made that the illegal items may be separated from the others; and in Bank of Mendocino *v.* Chalfant, 51 Cal., 369, it was held that, under like circumstances, the tax collector should receive the legal portion of the tax if tendered to him; and it has been frequently held that an injunction to restrain the collection of a tax, partly legal and partly not, will not be granted except upon condition that the legal part shall be first paid. (See Cooley on Taxation, 2nd ed. 763, and cases there cited.) That appellants erred in their conclusion that bonds were not taxable cannot relieve them."

Second Proposition.

505 The ten per centum penalty prescribed by the statute under consideration is not "excessive" and is not violative of section 13 of Article I of the Constitution of Texas.

Statement.

We here adopt the statement given under our First Proposition.

Remarks.

In the opinion of this court in this cause, we find only one reference, in express terms, to the ten per cent. penalty, that reference being in the general statement by the court of the nature of the suit.

Further on in said opinion we find set out the grounds upon which the trial court refused to enter judgment for the penalties sued for, and these grounds are broad enough to embrace the ten per cent. penalty as well as the forfeitures of two hundred dollars per day; but this court did not expressly adopt nor declare sufficient and valid the grounds assigned by the District Court in support of its judgment.

In all those portions of the opinion of this Court which set forth the grounds on which the penalties sued for are held to be "ex-

cessive," we find no mention of said *ten per cent. penalty,* but we do find therein several express references to the "forfeitures" of two hundred dollars per day.

Throughout its opinion, except in said general statement, this court appears to have treated "forfeitures" as penalties, and there is in said opinion nothing which satisfies our minds that this court did not overlook our Eighth Cross Assignment of Error and the matter of ten per cent. penalties.

This court's calculation fixes at $73,000.00 the penalties accruing for one year against the Gulf, West Texas & Pacific Railway Company.

That amount is just two hundred dollars, (the amount of
506 the daily "forfeitures"), multiplied by 365, the number of days in a year, and does not embrace a ten per cent. "penalty," which would increase the amount to $73,155.50, from which it appears that the court in its calculation ignored what the statute calls a "penalty" of ten per cent.

In said opinion of this court we find the following:

"The assessment of a penalty of one hundred per cent. for the failure to pay a tax would seem to be sufficiently excessive to authorize a court to declare it to be excessive, but the assessment of more than four thousand per cent. upon the amount detained can leave no possible question that the penalties are out of all proportion to the amount of money detained, and the law must be held to be void for the penalties."

It seems clear that this language can have no possible application to the ten per cent. "penalty" prescribed by the statute, because a penalty of ten per cent. upon the amount of the tax is not, even when measured by the standard so given, excessive in amount, and, in any event, is necessarily and mathematically proportionate to the amount of the tax upon which such penalty is calculated.

The courts in this state, as in many others, have uniformly upheld the constitutionality of statutes making it a misdemeanor to pursue an occupation without payment of the tax imposed by law, and have enforced such statutes by imprisonment for non-payment of the fine imposed, even though the fine be double the amount of the tax.

Fahey *v.* State, 27 Texas Crim. Rep., 146;
Pearce *v.* State, 35 Texas Crim. Rep., 150;
Travis *v.* State, 37 Texas Crim. Rep., 486;
Ex parte Williams, 31 Texas Crim. Rep., 262.

A life or health insurance company failing to pay a loss within the time specified in the policy after demand has been held liable for twelve per cent. on the amount of the loss as damages, and for all reasonable attorneys fees for the collection of the loss.

507 Insurance Co. *v.* Chowning, 86 Texas, 654;
Insurance Co. *v.* Orlopp, 61 S. W., 339;
Insurance Co. *v.* Phillips, 70 S. W., 605;
Fidelity Mutual Life Ins. Co. *v.* Mettler, 185 U. S., 308.

One of our courts of Civil Appeals, in Martin, Wise & Fitzhugh *v.* Johnson, 11 Texas Civ. Appeals, 628, upheld a statute which provided for public weighers and prohibited others from weighing certain produce under a penalty of not less than five dollars, but which did not prescribe a maximum penalty.

Various statutes prescribing penalties against railroads have been upheld in numerous decisions of the courts of this state, as shown at page 75-6 of our brief. At page 70 of said brief we have cited, and at pages 76-88 we have made a synopsis of numerous cases from various states upholding statutes prescribing penalties many of which were greatly in excess of ten per cent. some of the cases having arisen in states having constitutional provisions similar to our own upon the subject of fines and penalties.

R. S. Art. 5232*j*, concerning levy and collection of ad valorem taxes, provides that "if any person shall fail or refuse to pay the taxes imposed upon him or his property by law until the 31st day of January next succeeding the return of the assessment rolls of the county to the Comptroller, a penalty of ten per cent. on the entire amount of such tax shall accrue, which penalty, when collected, shall be paid proportionately to the state and county, and the collector of taxes shall, by virtue of his tax rolls, seize and levy upon and sell so much personal property belonging to such person as may be sufficient to pay his taxes, together with the penalty above provided, interest and all costs accruing thereon."

And it further provides that in case no personal property be found for seizure and sale, as above provided, the tax collector shall make up a list of the lands on which the taxes for the preceding year are delinquent, and that after approval thereof by the commis-
508 sioners' court and advertisement thereof "suit shall be instituted against delinquents for all taxes and penalties due," etc.

We have not been able to find that any appellate court in this state has been called upon to say whether or not this ten per cent. penalty for non-payment of ad valorem taxes is "excessive" and therefore void.

In City of Marlin *v.* Green 78 S. W., 704, the Court of Civil Appeals at Austin denied plaintiff's right to recover such a penalty, but expressly based its decision upon the fact that the property involved was a *homestead.*

Ever since 1897 the bench and bar of Texas seem to have treated this provision for a penalty as valid in all other instances.

R. S. Article 5232*n* provides that lands sold for delinquent taxes may be redeemed within two years thereafter "upon the payment of double the amount paid for the land."

Logan's Heirs *v.* Logan *et al.,* 72 S. W., 416.

It seems to us that for this court to hold that a penalty of ten per cent. for non-payment of occupation taxes when due is "excessive" and violative of our constitution would be to seriously hamper the collection of revenues with which to run our state, county and city governments. Such holding would, in effect, establish the rule that in no case in this state can a penalty of ten per cent. be collected by

law for non-payment of occupation, ad valorem or other taxes when due, and would seriously militate against the enforcement of many of our statutes to which reference is made on pages 71-76 of our brief.

As we understand the authorities, they are to the effect that a given penalty will not be held excessive unless it be so great in amount as to "shock the conscience of the court," and applying that test, it would seem that this ten per cent. penalty should be held to be constitutional.

In view of the great importance of the questions involved, we respectfully ask of the court an expression upon each of our
509 foregoing propositions.

Messrs. Baker, Botts, Parker & Garwood, who reside in the city of Houston, in Harris county, Texas, and N. A. Stedman Esq., who resides in the city of Austin, in Travis county, Texas, are the counsel and attorneys of record of the defendants in error.

Respectfully submitted,

R. V. DAVIDSON,
Attorney General,
WM. E. HAWKINS,
Assistant Attorney General for the State of Texas,
Plaintiff in Error.

We hereby waive issuance and service of precept and copy of the within Motion and for and in behalf of the defendants in error in the within mentioned cause hereby accept service upon said motion.

BAKER, BOTTS, PARKER & GARWOOD, AND
N. A. STEDMAN,
Attorneys for the Defendants in Error.

Endorsed: Mo. No. 1600. No. 1594. The State of Texas, Plaintiff in Error, *vs.* Galveston Harrisburg & San Antonio Railway Company, *et al.*, Defendants in Error. Motion of Plaintiff in Error for Rehearing and for Amendment of Judgment. Submitted Nov. 28, 1906. Service Accepted. Filed in Supreme Court of Texas November 21, 1906. F. T. Connerly, Clerk. Overruled Dec. 5, 1906.

510 *Order Overruling Motion of Defendants in Error for Rehearing.*

Dec. 5, 1906.

Mo. No. 1598. No. 1594.

THE STATE OF TEXAS
vs.
G., H. & S. A. RY. CO. ET AL.

From Travis County, 3rd District.

This day came on to be heard the motion of the defendants in error, the Galveston, Harrisburg & San Antonio Railway Company,

the New York, Texas & Mexican Railway Company, the Gulf, Western Texas & Pacific Railway Company and the Galveston, Houston & Northern Railway Company, for a rehearing, and the same having been duly considered, it is ordered, that said motion be overruled; that the defendants in error, Galveston, Harrisburg & San Antonio Railway Company *et al.* and their sureties, Jake Keller and C. G. Pillot, pay all costs incurred on this motion.

Order Overruling Motion of Plaintiff in Error for Rehearing.

Dec. 5, 1906.

Mo. No. 1600. No. 1594.

THE STATE OF TEXAS
vs.
G., H. & S. A. RY. CO. ET AL.

From Travis County, 3rd District.

This day came on to be heard the motion of Plaintiff in Error, The State of Texas, for a rehearing, and the same having been duly considered, it is ordered that the said motion be overruled; that the plaintiff in error, The State of Texas, pay all costs incurred on this motion.

511 *Application (Petition) for Writ of Error.*

Filed Dec. 18, 1906.

In the Supreme Court of Texas.

No. 1594.

THE STATE OF TEXAS
vs.
THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY, THE GALVESTON, HOUSTON & NORTHERN RAILWAY COMPANY, THE NEW YORK, TEXAS & MEXICAN RAILWAY COMPANY, and THE GULF, WESTERN TEXAS & PACIFIC RAILWAY CO.

To any Justice of the Supreme Court of the United States, or to the Chief Justice of the Supreme Court of the State of Texas:

Petitioners, The Galveston, Harrisburg & San Antonio Railway Company, the Galveston, Houston & Northern Railway Company, The Gulf, Western Texas & Pacific Railway Company, The New York, Texas & Mexican Railway Company, and Jake Keller, and C. G. Pillot, represent:

That on November 8, 1906, in the above entitled and numbered cause, pending in the Supreme Court of the State of Texas, wherein

The State of Texas, and none other, is plaintiff in error, and The Galveston, Harrisburg & San Antonio Railway Company, The Galveston, Houston & Northern Railway Company, The New York, Texas & Mexican Railway Company, and The Gulf, Western Texas & Pacific Railway Company, and none others, are defendants in error; and the said Jake Keller and C. G. Pillot, are sureties on the supersedeas appeal bonds of each of said defendants in error, petitioners herein, a judgment was rendered and entered in favor of The State of Texas and against the petitioners: that, on November 17, 1906, said defendants in error in said cause, to-wit: The Galveston, Harrisburg & San Antonio Railway Company, The Galveston, Houston & Northern Railway Company, The New York, Texas & Mexican Railway Company and The Gulf, Western Texas & Pacific Railway Company, petitioners herein, filed their motion for a rehearing of
512 said cause in said Supreme Court of The State of Texas, which said motion was by said Supreme Court, on December 5, 1906, in all things overruled, whereby said judgment became and is in all things a final judgment in favor of The State of Texas and against these petitioners.

That the said Supreme Court of the State of Texas is the highest court of the said the State of Texas in which a decision in said suit could be had.

And petitioners say that they are aggrieved by the said judgment and the proceedings in said suit, and that in the said judgment and proceedings had prior thereunto in said cause errors were committed to the prejudice of petitioners, because they say there was in said suit drawn in question the validity of Statutes of, and an authority exercised under, the State of Texas on the ground of their being repugnant to the constitution and laws of the United States, and the decision was in favor of their validity; and that titles, rights, privileges and immunities were in said suit claimed by petitioners under the constitution and statutes of the United States, and the decision in said suit was against the titles, rights, privileges and immunities specially set up and claimed therein by petitioners under such constitution and statutes, as will more fully appear from the general demurrer contained in paragraph II of petitioners' answer in said suit, and the special exceptions Numbers 2, 3, 7, 11, 22, 23, 24, 28, and 29 as contained in paragraph III of said answer, and in paragraph- V, VI and VII of said answer, and especially in sub-paragraphs 1, 2, 3, 6, 7, 8, 11, 13, 14, 15, 18, and 19 of said paragraph VII of said answer to the petition of the State of Texas in said suit, and as will further appear from the first, second, third, seventh, fourteenth, fifteenth, sixteenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, fortieth, forty-second, forty-third, forty-eighth, forty-ninth and fifty-first errors as-
513 signed by petitioners in the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas, to which court petitioners, the Galveston, Harrisburg & San Antonio Railway Company, The New York, Texas & Mexican Railway Company, The

Galveston, Houston & Northern Railway Company and the Gulf, Western Texas & Pacific Railway Company appealed this cause from the judgment of the district court of Travis county, Texas, within and for the 26th judicial district of said state, and from the judgment of which said Court of Civil Appeals the State of Texas prosecuted writ of error to the Supreme Court of said state herein. And as will also appear from the motion for a rehearing filed by petitioners herein in said Supreme Court of the State of Texas, and from the assignment of errors filed herewith, and which petitioners pray Your Honors will read as a part hereof.

Your petitioners refer to the assignment of errors filed herewith and pray that the same be considered for the purposes of this petition as a part hereof; and further pray that a writ of error may be allowed and issued herein to the said Supreme Court of the State of Texas which now has the record in this suit for the removal of said cause into the Supreme Court of the United States, to the end that the errors in said judgment and proceedings in said cause may be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, and that the transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to the Supreme Court of the United States.

BAKER, BOTTS, PARKER & GARWOOD,
H. M. GARWOOD,

Attorneys for The Galveston, Harrisburg & San Antonio Railway Company, The Galveston, Houston & Northern Railway Company, The New York, Texas & Mexican Railway Company, The Gulf, Western Texas & Pacific Railway Company, Jake Keller and C. G. Pillot, Petitioners.

514 Allowed on this the 18th day of December, 1906, same to operate as a supersedeas.

R. R. GAINES,
Chief Justice of the Supreme Court of Texas.

Endorsed: No. 1594. The State of Texas *vs.* The Galveston, Harrisburg & San Antonio Railway Company, *et al.* Application for Writ of Error. Filed in Supreme Court of Texas Decr. 18, 1906. F. T. Connerly, Clerk.

Bond.

Filed Dec. 18, 1906.

Know all men by these presents, That we, The Galveston, Harrisburg & San Antonio Railway Company, The Galveston, Houston & Northern Railway Company, The Gulf, Western Texas & Pacific Railway Company, The New York, Texas & Mexican Railway Company, Jake Keller and C. G. Pillot, as principals, and —— and ——, as sureties, are held and firmly bound to the State of Texas in the full and just sum of one hundred and twenty-five thousand dollars

($125,000.00) to be paid to the State of Texas, its successors or assigns, for which payment well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 12th day of December, in the year of our Lord, One Thousand, Nine Hundred and Six.

Whereas, lately at a term of the Supreme Court of the State of Texas in a suit pending in said court between the State of
515 Texas and the Galveston, Harrisburg & San Antonio Railway Company, the Galveston, Houston & Northern Railway Company, The Gulf, Western Texas & Pacific Railway Company, and the New York, Texas & Mexican Railway Company, a judgment was rendered against the Galveston, Harrisburg & San Antonio Railway Company, The Galveston, Houston & Northern Railway Company, The New York, Texas & Mexican Railway Company and the Gulf, Western Texas & Pacific Railway Company, plaintiffs in error herein, and against Jake Keller and C. G. Pillot the sureties on their appeal bonds, and the said Galveston, Harrisburg & San Antonio Railway Company, the Galveston, Houston & Northern Railway Company, The Gulf, Western Texas & Pacific Railway Company, the New York, Texas & Mexican Railway Company, and the said Jake Keller and C. G. Pillot, having obtained a writ of error and filed a copy thereof in the clerk's office in the said court to reverse the judgment in the aforesaid suit, and a citation directed to the State of Texas citing and admonishing said state to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said, The Galveston, Harrisburg & San Antonio Railway Company, The Galveston, Houston & Northern Railway Company, the New York, Texas & Mexican Railway Company, the Gulf, Western Texas & Pacific Railway Company, Jake Keller and C. G. Pillot, shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and effect.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,
THE GALVESTON, HOUSTON & NORTHERN RAILWAY COMPANY,
THE NEW YORK, TEXAS & MEXICAN RAILWAY COMPANY,
THE GULF, WESTERN TEXAS & PACIFIC RAILWAY COMPANY,
JAKE KELLER, AND
C. G. PILLOT,
516 *Principals, by Their Attorneys Baker, Botts, Parker & Garwood.*
JAS. A. BAKER, JR., *Surety.*
W. B. CHEW, *Surety.*
JNO. H. McCLUNG, *Surety.*

THE UNITED STATES OF AMERICA,
Southern District of Texas, ss:

I, C. Dart, Clerk of the Circuit Court of the United States for the Southern District of Texas, in the Fifth Circuit and District aforesaid, do hereby certify that Jas. A. Baker, Jr., W. B. Chew and John H. McClung, whose names appear signed to the annexed bond are in my opinion good and ample security for the amount therein specified, and that if said bond was offered to me for approval the same would be accepted and approved.

To certify which I have hereunto set my hand and official seal, this the 12th day of December, 1906.

[SEAL.] C. DART,
Clerk United States Circuit Court,
Southern District of Texas,
By L. C. MASTERON, *Deputy.*

The above and foregoing bond approved this the 18th day of December, 1906.

R. R. GAINES,
Chief Justice of the Supreme Court
of the State of Texas.

Endorsed: No. 1594. The Galveston, Harrisburg & San Antonio Railway Company, *et al., vs.* The State of Texas. Bond. Filed in Supreme Court of Texas. Dec. 18, 1906. F. T. Connerly, Clerk.

517 *Writ of Error (Original).*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the Judges of the Supreme Court of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said The Supreme Court of The State of Texas, before you, or some of you, being the highest court of said State in which a decision could be had in the said suit between The State of Texas, Defendant in Error, and The Galveston, Harrisburg & San Antonio Railway Company, The Galveston, Houston & Northern Railway Company, The New York, Texas & Mexican Railway Company, The Gulf, Western Texas & Pacific Railway Company, Plaintiffs in Error, and Jake Keller and C. G. Pillot, their sureties, wherein was drawn *the* question *of* the validity of a treaty or statute *of*, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under the State, on the ground of their being repugnant to the Constitution, treaties, or laws of The United States, and the decision was in favor of their validity, or wherein a title, right, privilege or immunity was claimed under the Constitution or a treaty, or statute

of, or commission held or authority exercised under The United States, and the decision was against the title, right, privilege or immunity specially set up or claimed under such Constitution, treaty, statute, commission or authority, a manifest error hath happened to the great damage of The Galveston, Harrisburg & San Antonio Railway Company, The Galveston, Houston & Northern Railway Company, The New York, Texas & Mexican Railway Company, The Gulf, Western Texas & Pacific Railway Company, and Jake Keller and C. G. Pillot, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then and under your seal distinctly and openly you send the records and proceedings with all things concerning the same to the Supreme Court of The
518 United States together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof; that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of The United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of The United States, this 18 day of December, in the year of our Lord, One Thousand, Nine Hundred and Six.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk of the Circuit Court of the United States,
Western District of Texas.
By —— ——, *Deputy.*

Allowed:
R. R. GAINES,
Chief Justice of the Supreme Court
of the State of Texas.

Filed in Supreme Court of Texas, Dec'r 18, 1906.
F. T. CONNERLY, *Clerk.*

519 *Citation in Error (Original).*

THE UNITED STATES OF AMERICA, *ss:*

To the State of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of The United States at Washington within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of The State of Texas, wherein The Galveston, Harrisburg & San Antonio Railway Company, The Galveston, Houston & Northern Railway Company, The Gulf, Western Texas & Pacific Railway Company, The New York, Texas &

Mexican Railway Company, Jake Keller and C. G. Pillot, are plaintiffs in error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiffs in Error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of The United States, this 18th day of December, in the year of our Lord, One Thousand, Nine Hundred and Six.

R. R. GAINES,
Chief Justice of the Supreme Court of the State of Texas.

Attest with the seal of United States Circuit Court for the Western District of Texas, this the 18 day of December, 1906.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk of the Circuit Court of the United States for the Western District of Texas.
By —— ——, *Deputy.*

520 Due service of the above and foregoing citation is hereby acknowledged, this 18th day of December, 1906.

S. W. T. LANHAM,
Governor of Texas.
R. V. DAVIDSON,
Attorney General of Texas.
WM. H. HAWKINS,
Assistant Attorney General of Texas.

Filed in Supreme Court of Texas, Dec'r 18, 1906.
F. T. CONNERLY, *Clerk.*

521 *Assignments of Error.*

Filed December 18, 1906.

In the Supreme Court of the State of Texas.

No. 1594.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL., Plaintiffs in Error,
versus
THE STATE OF TEXAS, Defendant in Error.

Now come the plaintiffs in error, the Galveston, Harrisburg & San Antonio Railway Company, the New York, Texas & Mexican Railway Company, the Gulf, Western Texas & Pacific Railway Company, the Galveston, Houston & Northern Railway Company, and

Jake Kaller and C. G. Pillot, and, on writ of error from the Supreme Court of the United States, make and file the following assignments of error, and say that in the records and proceedings in said cause, the Supreme Court of the State of Texas, erred in this:

First.

The Supreme Court of the State of Texas, having construed the Act of the Legislature of the State of Texas, approved April 17th, 1905, entitled,

"An Act, imposing a tax upon railroad corporations, the receivers thereof, and other persons, firms and associations of persons, owning, operating, managing or controlling any line of railroad in this state, for the transportation of passengers, freight and baggage, or either, equal to one per cent. of their gross receipts, and providing for the collection and payment thereof; and repealing the existing tax on the gross passenger earnings of railroads."

Said Act imposing a tax upon railroads, including plaintiffs in error herein, equal to one per cent. of their gross receipts, as embracing gross receipts from interstate and foreign commerce; erred, in holding that said statute, in so far as it included such receipts from interstate and foreign transportation, was not contrary to, and in violation of, that clause of Section 8 Article I of the Con-
522 stitution of the United States, which provides that "Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes," for, by whatever name such tax may be called, whether an occupation, excise, franchise or income tax, the necessary effect of including one per cent. of the receipts from interstate and foreign transportation in the ascertainment of the amount of tax was, and is, to regulate, impede, obstruct, tax and place a burden upon such interstate and foreign commerce.

Second.

It appearing from the record herein, that the plaintiffs in error, in common with other railroad companies in the State of Texas, have paid and would pay, ad valorem taxes on their respective properties under the laws of the State of Texas, to impose upon plaintiffs in error, in common with other railroad companies, a tax in the form of a tax equal to one per cent. of their gross receipts from foreign and interstate commerce, when no like tax is imposed upon other property owners, is necessarily, to regulate and place a burden upon interstate and foreign commerce, contrary to Section 8, Article I of the Constitution of the United States, which confers upon Congress the power to regulate such commerce; wherefore, the Supreme Court of the State of Texas erred, in holding that said Act of the Legislature, approved April 17th, 1905, imposing a tax upon railroad companies equal to one per cent. of their gross receipts, in so far as in ascertaining the amount of taxes to be paid thereunder, it included one per cent. of the gross receipts of such companies from the transportation of interstate and foreign commerce, was not contrary to,

and in violation of, said Section 8, Article I, of the Constitution of the United States, conferring upon Congress the power to regulate commerce with foreign nations and among the several States, and with the Indian Tribes.

523 Third.

The Supreme Court of the State of Texas erred, in holding that said Act of the Legislature of the State of Texas, approved April 17th, 1905, imposing a tax upon railroad companies equal to one per cent. of their gross receipts, in so far as said Act in the estimation of the tax required to be paid, included one per cent. of the gross receipts of the railway companies, plaintiffs in error, from the transportation of interstate and foreign commerce, was not contrary to, or violative of, Section 8, Article I, of the Constitution of the United States, which confers upon Congress the power to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes.

Fourth.

The Supreme Court of the State of Texas, having determined that the tax imposed by said Act of the Legislature, approved April 17th, 1905, was an occupation tax, and that in ascertaining the amount of such tax, one per cent. of the gross receipts of the railway companies therein referred to from interstate and foreign commerce were, and are, to be included, and plaintiffs in error, in common with other railway companies of the State of Texas, being required and compelled by the Constitution of the State of Texas to pursue the occupation of common carriers of intrastate freight and passengers, and being therefore unable to renounce such occupation, and being at the same time engaged in the common carriage of interstate and foreign commerce, the necessary effect of the tax imposed by said Act, and sought to be recovered in this suit, is to impose a burden and restriction on interstate and foreign commerce, and to regulate the same, in contravention of Section 8, Article I, of the Constitution of the United States, which confers upon Congress the power to regulate commerce with foreign nations, and among the several States.

524 Fifth.

The Supreme Court of Texas erred in its judgment herein, because the assessment of a tax at a sum equal to one per cent. of the gross interstate and foreign earnings of plaintiffs in error, is, in effect, an impediment to, and serious obstruction of, and a burden upon, interstate and foreign commerce, since plaintiffs in error and other railroad companies, in fixing their interstate and foreign rates, will necessarily consider that from the earnings of all such transportation, they must yield up to the state a sum equal to one per cent. thereof; and because, if the State could demand one per cent. of such receipts from interstate and foreign transportation, it could demand any larger percentage, and under this form of taxation, the State could practically, without limit, regulate or suppress interstate and

foreign commerce, contrary to the provision of Section 8, of Article I, of the Constitution of the United States, which delegates to Congress the power to regulate traffic between the States and with foreign nations.

Sixth.

The Supreme Court of Texas erred in its judgment herein, for that: If the Act of the Legislature, approved April 17th, 1905, above referred to, be construed as imposing an occupation tax solely upon the occupation of engaging in State commerce, it is nevertheless in violation of Section 8, of Article I, of the Constitution of the United States, which confers upon congress the power to regulate commerce with foreign nations and among the several states, for, in arriving at the amount of the tax, the receipts derived from interstate and foreign commerce, as well as those derived from State transportation, are taken as a basis, thereby causing the tax to directly regulate, relate to and affect interstate and foreign commerce;
525 • while the State, in arriving at the amount of an occupation tax, cannot take as a basis, matters such as interstate commerce which the State has no power to tax, as this would accomplish indirectly what the State is without power to do directly.

Seventh.

The Supreme Court of the State of Texas erred, in failing and refusing to hold that said Act of the Legislature of the State of Texas, approved April 17th, 1905, is violative of, and in contravention of, Section 1, of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law, nor to deny to any person within its jurisdiction the equal protection of the laws, in this: That it appears from the uncontradicted evidence herein, that during the year ending June 30th, 1905, and before and since that time, and during the entire period of time involved herein, a large portion of commerce of the State of Texas was conducted by common carriers by water, and electric railways, in competition with plaintiffs in error and other common carriers by rail; that such competition by common carriers by water and electric railways, was and is real and substantial, and to a very large extent, affected the rates charged for transportation by plaintiffs in error and other common carriers by rail; that said Act, herein involved, does not impose, and no other Act of the Legislature of the State of Texas imposes a similar tax on such common carriers by water and electric railways, or upon any other common carriers, except common carriers by rail, and the same is therefore, unequal and discriminatory, as against plaintiffs in error and other railway companies, and deprives them, and each of them, of the equal protection of the law.

Eighth.

The Supreme Court of the State of Texas erred, in failing
526 and refusing to hold that the said Act of the Legislature of the State of Texas, approved April 17th, 1905, and the tax

thereby imposed, is invalid and void, for that: Plaintiffs in error are railway companies, chartered as such, with property which can be used for no other purpose, and which are compelled under the law, to dedicate their property to such use, and none other; that they have had such property, which includes their franchises, fairly assessed and valued for taxation, in the same proportion to actual value as the property of other citizens in the State of Texas, and are now paying the same ad valorem tax thereon, and for the year 1905, and for all prior and succeeding years, have paid and will pay to the State of Texas, taxes at the same rate and in the same proportion to actual value as other citizens of the State of Texas; and in addition thereto, have, under the laws of the State of Texas, paid and are required to pay a specific franchise tax; and to impose upon plaintiffs in error and other railway companies in the State of Texas—they, and each of them, being engaged in interstate commerce—under the guise of an occupation tax, franchise tax, income tax, or otherwise, a tax upon the receipts from and proceeds of the use of their properties thus taxed, a burden of taxation more than double that imposed under such regular ad valorem taxes levied upon the properties of other citizens of the State of Texas by the general law, and out of all due proportion to all other occupation taxes, as is shown by the uncontradicted evidence herein, operates to deprive, and does deprive plaintiffs in error, and each of them, of their property without due process of law, and denies to them, and each of them, the equal protection of the law, contrary to Section 1, of the Fourteenth Amendment to the Constitution of the United States, and regulates, hinders and obstructs commerce between the States and with foreign countries, contrary to the provisions of Section 8,
527 Article I, of the Constitution of the United States which confers upon Congress the right to regulate commerce between the States and with foreign countries.

Ninth.

The Supreme Court of the State of Texas, erred in failing and refusing to hold that said Act of the Legislature of the State of Texas, approved April 17th, 1905, and the tax thereby imposed, is in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person within its jurisdiction, of the equal protection of the law, in this: That said Act, as construed and enforced by the Supreme Court of the State of Texas herein, is held to be imposed as an occupation tax or franchise tax upon the intrastate business of plaintiffs in error, and under the terms of said Act, as so construed, plaintiffs in error, and other railway companies subject thereto, are required to pay a tax based upon their earnings, not only from the intrastate business taxed, but also upon their receipts from interstate transportation and international transportation, and the evidence herein showing without controversy, that the earnings of the various railway companies of the State of Texas, derived from intrastate business, as compared with the total amount of their gross receipts from interstate and foreign business, vary

so greatly, that the effect of the enforcement of the Act as so construed, would be and is, to require different railway companies in the State of Texas to pay different percentages on their receipts from State business, for the right to pursue such business, it being a denial of the equal protection of the law to compel one railway company which does a small intrastate business, to pay an equal or a larger tax than a railway company, situated in the same State,
528 which does a far greater intrastate business, for the privilege of pursuing the same business, solely by reason of the fact that the first named railway company does a larger business, both interstate and foreign, and is therefore, a denial of the equal protection of the law.

Tenth.

The Supreme Court of the State of Texas erred, in failing and refusing to hold that, because the evidence herein shows that the Texas & Pacific Railway Company is now, and was during the period involved in this suit, a railway corporation engaged in the transportation of commerce, both interstate and foreign, and intrastate, within the State of Texas, and belonging to the same class, and being in active competition with plaintiffs in error and the other railway companies in the State, and the proof further showing that the said The Texas & Pacific Railway Company was chartered under and by virtue of the laws of the United States, and the Supreme Court of Texas, having held herein that the tax involved in this suit and levied by said Act of April 17th, 1905, was an occupation tax for the privilege of pursuing a business within the State of Texas, such occupation tax cannot be applicable to said The Texas & Pacific Railway Company, the same being a Federal corporation, and being therefore, as such Federal corporation, exempt from such tax, the application thereof to plaintiffs in error, being in the same class and similarly situated, would be to deprive them, and each of them, of the equal protection of the law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Eleventh.

The Supreme Court of Texas erred in its judgment herein, in holding that in estimating the amount of tax equal to one per cent. of the gross earnings of plaintiffs in error, the earnings derived
529 by plaintiffs in error from the government of the United States in the carriage of mails should be included, for the effect of such holding, is that the State may directly tax the carriage of United States mails, or compensation paid by the Government therefor, and is a tax upon an instrumentality of the Government of the United States, in violation of Subdivision 8, Section 8, Article 1, of the Constitution of the United States, empowering Congress to establish post offices and post roads, and is violative of Section 2 of Article VI of the Constitution of the United States, providing that the Constitution of the United States and the laws made in pursuance thereof, is the supreme law of the land.

Wherefore, plaintiffs in error pray that the judgment of the Supreme Court of the State of Texas be reversed, and that this cause be remanded, and for such other proceedings as law and justice may require.

BAKER, BOTTS, PARKER & GARWOOD,
H. M. GARWOOD,
Attorneys for the Galveston, Harrisburg & San Antonio Railway Company; The New York, Texas & Mexican Railway Company; The Gulf, Western Texas & Pacific Railway Company; The Galveston, Houston & Northern Railway Company, Jake Keller and C. G. Pillot, Plaintiffs in Error.

Endorsed: No. 1594. The Galveston, Harrisburg & San Antonio Railway Company, *et al.*, Plaintiffs in Error, *versus* The State of Texas, Defendant in Error. Assignments of Error. Filed in Supreme Court of Texas, Dec. 18, 1906, F. T. Connerly, Clerk.

530 Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the foregoing five hundred and twenty-nine pages, except pages 517, 518, 519 and 520, contain a true and correct copy of the transcript of the record of all the proceedings had in the District Court of Travis County, Texas, in the Court of Civil Appeals for the 3rd. Supreme Judicial District of Texas and in the Supreme Court of Texas, as the same appear of record and on file in this office in cause No. 1594 entitled, The State of Texas, Plaintiff in Error, *vs.* the Galveston, Harrisburg & San Antonio Railway Company *et al.*, Defendants in Error.

I further certify that the pages herein numbered 517, and 518 is the original writ of error, of which a copy has been lodged and is now on file in this office; and that the pages herein numbered 519 and 520, is the original citation in error, a copy of which is now on file in this office.

In testimony whereof, I have hereto signed my name, and affixed the seal of the Supreme Court of Texas, done at the city of Austin, this the 12th. day of January, A. D. 1907.

[Seal Supreme Court of the State of Texas.]

F. T. CONNERLY,
Clerk of the Supreme Court of Texas.

Endorsed on cover: File No. 20,540. Texas supreme court. Term No. 575. The Galveston, Harrisburg & San Antonio Railway Company *et al.*, plaintiffs in error, *vs.* The State of Texas. Filed January 19th, 1907. File No. 20,540.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

No. 207.

THE GALVESTON, HARRISBURG & SAN ANTONIO RY. CO., THE NEW YORK, TEXAS & MEXICAN RY. CO., THE GULF, WESTERN TEXAS & PACIFIC RY. CO., THE GALVESTON, HOUSTON & NORTHERN RY. CO.,

Plaintiffs in Error,

vs.

THE STATE OF TEXAS,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

ROBERT S. LOVETT,
MAXWELL EVARTS,
HIRAM M. GREENWOOD,
Of Counsel for Plaintiffs in Error.

BAKER, BOTTS, PARKER & GARWOOD,
Attorneys for Plaintiffs in Error.

A. S. Pratt, Printer and Bookbinder, 2 & 4 Rector St., N. Y.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1907.

No. 207.

THE GALVESTON, HARRISBURG & SAN ANTONIO RY. CO., THE NEW YORK, TEXAS & MEXICAN RY. CO., THE GULF, WESTERN TEXAS & PACIFIC RY. CO., THE GALVESTON, HOUSTON & NORTHERN RY. CO.,

Plaintiffs in error.

vs.

THE STATE OF TEXAS,

Defendant in error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS:

BRIEF FOR PLAINTIFFS IN ERROR.

This suit originated in the District Court of Travis County, in the State of Texas. The petition was filed on the 24th day of November, 1905. The suit was brought in the name of the State

of Texas by her Attorney General, Robert Vance Davidson, against the Galveston, Harrisburg & San Antonio Ry. Co., the New York, Texas & Mexican Ry. Co., The Gulf, Western Texas & Pacific Ry. Co., and the Galveston, Houston & Northern Ry. Co., for taxes, penalties and forfeitures under the provisions of Chapter 141 of the Acts of the Twenty-ninth Legislature of Texas. It is one of a number of suits for amounts aggregating approximately one million dollars, which were filed at about the same time against twenty-four railroad companies.

Plaintiff's petition (R. 1-6) alleged in substance that each of the defendants is a railroad corporation, duly incorporated under the laws of Texas; that continuously prior to June 30, 1904, each of the defendants (plaintiffs in error here) owned, operated, managed and controlled lines of railroad lying wholly within the State of Texas for the transportation of passengers, freight and baggage; that the gross receipts of all the defendants (plaintiffs in error here) for the year ending June 30, 1905, were respectively as follows:

The Galveston, Harrisburg & San Antonio Ry. Co.	$7,472,458.47
The New York, Texas & Mexican Ry. Co.	509,458.17
The Gulf, Western Texas & Pacific Ry. Co.	155,511.01
Galveston, Houston & Northern Ry. Co.	1,248,117.47

That each of the defendants, in accordance with the provisions of said Acts of the Twenty-ninth Legislature, a copy of which is attached to this brief, marked "Exhibit A.", made under oath in writing to the Comptroller of Public Accounts in said State, showing the gross receipts of said defendants from every source whatever for the year ending on the 30th day of June, 1905, in the amounts above specified; that said reports were duly filed in the office of the Comptroller of Public Accounts and approved by him; and that

said Comptroller of Public Accounts, as demanded by said Act of the Legislature, calculated, estimated and assessed the tax to be paid by each of the said defendants for the year 1905 under said act at the sum of one per cent (1%) of each of the above amounts, being one per cent (1%) of the defendants' gross receipts from whatever source derived for the fiscal year ending June 30, 1905.

That under said statute of the State of Texas, said tax became due and payable to the State of Texas through her State Treasurer in Travis County on October 1, 1905; that by reason of the premises, each of the said defendants (plaintiffs in error here) became liable to pay the State of Texas in said County of Travis on the first day of October, 1905, as such annual tax for the year 1905, a sum equal to 1% of said gross receipts as follows:

The Galveston, Harrisburg & San Antonio Ry. Co.	$74,724.50
The New New York, Texas & Mexican Ry. Co.	5,094.58
The Gulf, Western Texas & Pacific Ry. Co.	1,555.11
The Galveston, Houston & Northern Ry. Co.	12,481.17

which said sums each of said defendants failed and refused to pay; that said statute provides that should the annual tax prescribed be not paid to the State Treasurer before the first day of October of any year, a penalty of 10% should accrue thereon and be added thereto; and that in case the tax and penalty should not be paid on or before the first day of November thereafter, the railroad corporation from whom the same should be due should forfeit and pay to the State of Texas a penalty of $200.00 for each day payment of such tax and penalty should be delayed after the first day of November of that year.

It was alleged that by reason of the failure to pay such tax on the first day of November each of said defendants had incurred said penalty of 10% upon the amount due as above set out. Judg-

ment was asked for the amount of the tax and 10% penalty in the following sums, to-wit:

The Galveston, Harrisburg & San Antonio Ry. Co.	$85,000.00
The New York, Texas & Mexican Ry. Co.	6,000.00
The Gulf, Western Texas & Pacific Ry. Co.	2,500.00
The Galveston, Houston & Northern Ry. Co.	15,000.00

It was further alleged that by reason of the failure to pay said tax and penalty in the amounts above set out, each of said defendants had forfeited and become liable to pay the State of Texas the sum of $200.00 per day for each day after November 1, 1905, down to and including the day on which the petition was filed, amounting in the aggregate on the date of filing of the petition to the sum of $4,600.00 penalties claimed against each of said defendants, it being alleged that each of said defendants would become liable to pay said sum of $200.00 per day penalties for each day after the filing of said petition until the principal sum and 10% penalties above specified should be paid, for all of which sums so alleged to be due the State of Texas asked judgment.

It was further alleged (R. 2–3) that the Galveston, Harrisburg & San Antonio Railway Company in August, 1905, being duly authorized thereto by a special Act of the Twenty-ninth Legislature of the State of Texas approved May 3, 1905, acquired all of the properties of its co-defendants, the New York, Texas & Mexican Railway Company, The Gulf, Western Texas & Pacific Railway Company, and the Galveston, Houston & Northern Ry. Co., and at the time of the filing of said suit, said properties were being operated as a part of the railway system of the Galveston, Harrisburg & San Antonio Railway Company; and that under the terms and provisions of said special act which had been accepted by said Galveston, Harrisburg & San Antonio Railway

Company, all of the properties of its co-defendants thus acquired by it were respectively bound and liable for all debts, charges and claims against each of them respectively, and that the taxes, penalties and forfeitures sued for against each of said co-defendants were charges upon the property formerly belonging to them respectively, then in the hands of and being operated by the Galveston, Harrisburg & San Antonio Railway Company.

The defendants (plaintiffs in error here), on November 28, 1905, (R. 8-37) filed their original answer, demurring generally and specially to said petition of defendant in error, and answering by general denial and special answers as hereinafter specifically set forth :—

1. General Demurrer to Plaintiff's Petition. (R. 8.).

2. The following special exceptions :

(2). Said Act of the Legislature in said petition referred to is unconstitutional and void, for that the same is in conflict with and in contravention of the third paragraph of section eight, article one of the Constitution of the United States, which provides, "that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian Tribes," in this, that said act seeks to levy and does levy a tax directly upon defendant's receipts from interstate and foreign commerce and regulates, obstructs and hinders commerce between the several states and with foreign nations. (R. 8.)

(3) That said act is violative of and in contravention of section one of the fourteenth amendment to the Constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, in

this, that said act provides that the taxes therein levied shall be in addition to all other taxes now levied by the law, and the court being judicially informed that the property of this defendant has been and is now assessed for taxation upon an *ad valorem* basis and rate as all other citizens of the State of Texas, to now levy upon it an additional tax of one per cent. upon its gross receipts, when a like tax is not levied on other citizens of said state is an unequal, unjust, and arbitrary discrimination in taxation against this defendant contrary to said section one, article fourteen of the amendments to the Constitution of the United States. (R. 9.).

(22). Said tax imposed in said act is violative of section one, article fourteen of the amendments to the Constitution of the United States in this, that it deprives defendant of the equal protection of the law, no like income tax being imposed upon other persons and corporations in said State. (R. 12.).

(23). That said tax imposed by said act of the Legislature denies defendant the equal protection of the law contrary to said section one, article fourteen of the amendment to the Constitution of the United States, in this, that thereby a tax of one per cent. on its gross income is imposed, while no like tax is imposed upon other persons and corporations in said State, and by Section nineteen of Article eight of the Constitution of the State of Texas incomes from lands used for farming purposes are exempted from taxation. (R. 12.).

(24). That said act is violative of section ten, article one of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts in this, that it appears upon the face of plaintiff's petition that defendant is a corporation chartered under the laws of the State of Texas, as a common carrier of freight and passengers, with the power to do

and perform all and singular the acts and things usually incident to the transaction of the business of a corporation. That said charter constitutes and is a contract between the State of Texas and defendant, under which the State of Texas extended to it the privilege and franchise conferred in said charter and that the imposition of an unequal, unusual and confiscatory burden of taxation imposed by said bill is such as was not contemplated in such contract and operates to impair the obligations thereof (R. 12.).

(28). That it appears upon the face of said act and of plaintiff's petition that same is violative of section one of article fourteen of the Constitution of the United States, in this, that it imposes upon this defendant and other railway corporations similarly situated a burden of taxation which is unequal, unreasonable, and discriminatory, and such as is not imposed upon other persons, citizens or tax payers of the State of Texas, and therefore deprives defendant of the equal protection of the law. (R. 13.).

(29). Under the Constitution and laws of the State of Texas and of the laws of the United States, defendant is authorized, empowered and required to connect with the railroads of other states and is engaged in the transportation of inter-state and foreign commerce and as such is an instrumentality of inter-state commerce and the act alleged, if considered as an occupation or privilege tax, levies on defendant a tax far in excess of and in addition to the regular *ad valorem* tax imposed under the general laws of the State of Texas and is a regulation, hindrance and obstruction to inter-state commerce contrary to the third paragraph of section eight, article one of the Constitution of the United States, which provides that "Congress shall have power to regulate commerce with foreign nations and among the several states and with Indian Tribes". (R. 13.).

Defendants (plaintiffs in error here) also filed (Paragraph IV., R. 13.) a general denial, and, among others, the following special answers:

1. Further answering, defendants, the Galveston Harrisburg & San Antonio Ry. Co., the Galveston, Houston & Northern Ry. Co., the New York, Texas & Mexican Ry. Co., the Gulf, Western Texas and Pacific Ry. Co. allege that they and each of them are railroad corporations duly chartered as such under the laws of the State of Texas, at the dates hereinafter mentioned, to-wit:—

The G. H. & S. A. Ry. Co. by special Act of the Legislature of Texas, date February 11th, 1850, and acts amendatory thereof;

The G. H. & N. Ry. Co. under general law by charter of date March 25, 1899.

The N. Y. T. & M. Ry. Co. under the general law by charter of date October 18th, 1880;

The G. W. T. & P. Ry. Co. under the general law by charter of date April 5th, 1878, and prior to the 17th day of April, 1905, with the rights, privileges and duties conferred and imposed upon railroad corporations under the general laws of the State of Texas. That subsequent to June 30, 1905 and prior to the filing of this action, the Galveston, Harrisburg & San Antonio Railway Company, under the provisions of an act of the Legislature of the State of Texas of date May 11, 1905, for which see Chapter 58, p. 502 of the special laws of the Twenty Ninth Legislature of the State of Texas to which reference is here made, and the same is prayed to be taken as a part of this answer, acquired the property of its co-defendants herein. That for many years prior to the date of the acquisition of their said properties by the Galveston, Harrisburg & San Antonio Railway Company, and especially during the year ending June 30, 1905, said defendants owned, operated and conducted railways in the State of Texas, as follows, that is to say: The New York, Texas & Mexi-

can Ry. Co. owned and operated and maintained a railroad from the city of Rosenburg in Fort Bend County through the counties of Fort Bend, Wharton, Jackson, Victoria and Matagorda, its principal office being situated at Victoria in Victoria County, embracing a main line mileage of 176.7 miles; that the Gulf, Western Texas & Pacific Ry. owned, operated and conducted a railway from the city of Cuero in De Witt County, through the Counties of De Witt, Victoria and Calhoun to Port Lavaca on Lavaca Bay, an arm of Matagorda Bay and from the town of Victoria in said County of Victoria through the counties of Victoria and Goliad to Beeville in Bee County, embracing a main line mileage of 111.1 miles; that the Galveston, Houston & Northern Ry. owned, operated and conducted a line of railway from Galveston in Galveston County through the counties of Galveston and Harris to Houston in said County, a distance of 50.4 miles. That the principal office of said Gulf, Western Texas & Pacific Ry. was situated in Victoria in Victoria County, and of the Galveston, Houston & Northern Ry. in Houston, Harris County. That prior to its acquisition of the railway lines of its above-mentioned codefendants the Galveston, Harrisburg & San Antonio Railway Company owned and operated a line of railway from Houston in Harris County, Texas, where its principal office is situated, through the counties of Harris, Fort Bend, Colorado, Fayette, Gonzales, Caldwell, Gaudalupe, Bexar, Medina, Uvalde, Kinney, Maverick, Val Verde, Pecos, Brewster, Presidio, Jeff Davis, and El Paso to the city of El Paso on the border between the State of Texas and Mexico, embracing a total of 1241.86 miles of main line and 259.26 miles of yardage and sidings. That said system of railways thus owned by these defendants and now owned and operated by defendant, the Galveston, Harrisburg & San Antonio Railway Company, does now and did at the several times herein enquired about extend from the city of Galveston, a sea

port and port of entry, with an extensive foreign and inter-state commerce, both by sea and land, both import and export, through the City of Houston in Harris County to Port Lavaca, situated upon the navigable waters of Matagorda Bay, through the City of San Antonio and intermediate cities to the City of El Paso, situated on the border of Texas, and near the territory of New Mexico. That at the City of Houston, San Antonio and intermediate cities, it has connection with all the trunk railway systems of the State of Texas, doing an inter-state and foreign as well as a state business, both freight and passenger, and at the cities of Del Rio and El Paso, it has connection with railways extending into Mexico and doing a foreign business, both freight and passenger and at said latter city it has connection with inter-state railways extending into and through New Mexico and other territories and states of the United States and with foreign countries, and that with each and all of its connecting railways, both state and inter-state, the said defendants did at each and all of the times aforesaid, as by law it was permitted and required to do, connect by physical connection of tracks and interchange freight and passengers, both state, inter-state and foreign. That said Galveston, Harrisburg & San Antonio Ry. Co. is now and has been for many years continuously prior to this date and each of its said co-defendants did for many years prior to the acquisition of their properties by the said Galveston, Harrisburg & San Antonio Railway Company, engage in the business of transportation for hire of passengers, freight and baggage, both state and inter-state, over their said lines of railway, and in the transaction of such other business as is commonly performed by common carriers. That under and by virtue of the terms of the Act of May 11, 1905, to which reference is above made, the property of its co-defendants so acquired by the Galveston, Harrisburg & San Antonio Ry. Co. is bound and liable for all debts,charges

and claims against said company and each of them and said properties are chargeable in the hands of said Galveston, Harrisburg & San Antonio Railway Company with all debts, claims and charges of every kind whatsoever existing against each of said companies at the time of its acquisition, as aforesaid, by said Galveston, Harrisburg & San Antonio Railway Company. (Par. V., R. 13-15).

2. That said lines of railway so owned and conducted by defendants are and were at times enquired about situated wholly within the State of Texas and under the Constitution and laws of the State of Texas and under the laws of the United States are authorized to connect with other lines of railway in the said State of Texas and to connect with the lines of railway of other roads outside the State of Texas at the State line. That under the constitution and laws of the State of Texas and of the United States, defendants are and at times enquired of were common carrier of freight, passengers and baggage and authorized and required to receive, forward and transport freight and passengers between points within the State of Texas and between points in said State and points in other States of the United States and foreign countries, and as to such latter transportation, were and are inter-state carriers and such transportation is inter-state commerce. That during the year ending June 30, 1905, the gross receipts of defendants from freight and passenger traffic and all other sources were as follows :

The G. H. & S. A. Ry. Co.

Inter-state traffic	$5,209,389.79
Intra-state "	1,578,755.11
Unapportioned "	684,324.42
Total	$7,472,458.48

The G. H. & N. Ry. Co.

Inter-state traffic	$946,057.49
Intra-state "	252,514.95
Unapportioned "	51,545.03
Total	$1,248,117.47

The G. W. T. & P. Ry. Co.

Inter-state traffic	$31,121.81
Intra-state "	98,142.32
Unapportioned "	26,246.88
Total	$155,511.01

The N. Y. T. & M. Ry. Co.

Inter-state traffic	$181,020.80
Intra-state "	281,556.09
Unapportioned "	47,181.21
Total	$509,458.17

(R. pp. 15–16).

3. Defendant's said lines of railway are situated wholly within the State of Texas and are authorized by the laws of this State and of the United States to connect with other lines of railway in said State and lines outside of the State of Texas at the State line. That they are now and were at the several times hereinbefore set out under the Constitution and laws of this State and of the United States, common carriers of freight and passengers and as such, authorized, required and compelled to receive and transport freight and passengers between points within the State of Texas and between points in said State and points in the United States and foreign countries and as to such latter transportation of freight and

passengers is an inter-state carrier and such transportation is inter-state commerce. That for the year ending June 30, 1905, defendant's gross receipts from its inter-state commerce were as alleged in the paragraph next preceding and its gross receipts from intra-state commerce were as alleged in the paragraph next preceding.

That its receipts from inter- and intra-state commerce for the several years next immediately preceding the institution of this suit bear approximately the same relative ratio as for the year ending June 30, 1905, as aforesaid, all of which will more fully appear from the statement thereof, which is hereto attached and made a part hereof, marked Exhibit A.

That said act plaintiff declared upon purports to levy a tax of one per cent. upon said gross receipts received for the transportation of inter-state and foreign commerce and the same is unconstitutional and void, because the levy thereof on said receipts from inter-state and foreign transportation is in violation of the third sub-division of section eight, article one of the Constitution of the United States, which provides that "Congress shall have the power to regulate commerce with foreign nations, and among the several states and with the Indian Tribes", in that the levy and collection of such tax upon receipts from inter-state and foreign commerce is a regulation, obstruction and hindrance thereof. That defendant's rates on commerce within that State of Texas are, have been, and will be fixed by the Railroad Commission of Texas and defendant, if disposed to do so, has and has had no power and has not been and will not be permitted by the Railroad Commission of said State to so adjust its rates as to impose on the intra-state commerce rates by which it may collect on freight traffic a sum equal to one per cent. of its inter-state and foreign commerce, so that if said sum of one per cent. on said receipts is required to be

paid, it will be paid necessarily from said gross earnings on interstate and foreign commerce. (Sub. Par. 1, Par. VII., R. 16-17).

4. That under the Constitution of the State of Texas all property whether owned by natural persons or corporations within said State can only be taxed in proportion to its value; and all taxes must be equal and uniform; that such property shall be assessed in the several counties in which the same is situated, including as much of the road-bed and fixtures as is in each county, except that the rolling stock may be assessed in gross in the county where the principal office of the company is located, and the Comptroller must apportion the same to the several counties through which the road runs in proportion to the distance it runs in each county; that all property whether owned by persons or corporations must be assessed for taxation and the taxes paid in the county where situated except that taxes of non-residents may, by two-thirds vote of the Legislature, be authorized to be paid at the office of the Comptroller. That for the purpose of assessing property, the Constitution provides for the election in each county in the State of a tax collector to assess the property of persons and corporations for taxation, and the Constitution also provides that the Commissioners Court of the respective Counties in the State shall constitute a board of equalization, with power and authority to equalize as near as may be the valuation of all property subject to or rendered for taxation. That in pursuance of said Constitutional provisions, the Legislature of the State of Texas has heretofore passed laws in accordance with the provisions hereof, and property in this State, whether owned by natural persons or corporations, has been subject to such local assessments for taxation by the assessors and boards of equalization since the adoption of the present Constitution. That such assessments so made by the assessors and approved and

equalized by the boards of equalization of the respective counties is required by law to give a just, fair and proper valuation of all properties subject to taxation, and their action in making same is not subject to revision by any tribunal or department of government after the same is made and finally approved by the board of equalization ; that the fixing of the value of property by the assessors and by the boards of equalization of the respective counties is a judicial determination of the value of the property assessed, which is final and conclusive and not subject to review by any authority in the State of Texas. That in accordance with the Constitution and laws of the State of Texas, defendant has rendered to the assessors of taxes in the respective counties through which its lines of railway run, and in which they are situated, and the assessors of taxes of each of said counties respectively, assessed and the boards of equalization thereof approved and equalized, the assessments of all of your defendant's property situated in each of said counties, respectively, including its rolling stock which was thus assessed in Harris County for the year 1905, and the action and judgment of the assessors in assessing the same, and the action and judgment of the boards of equalization of each of said counties, respectively, in approving and equalizing said assessments, has become final, and now fixes and establishes the value of your defendant's property for taxation situated and being in the State of Texas, and as defendant is advised and believes there is no method provided by law for the revision of such assessments and valuations and that such assessments and valuations are in truth and in fact the true and actual proportionate valuations of said property. That all the taxes to which defendant is subject for State, county and independent school districts purposes are included in such assessments, and defendant will be compelled to pay, and will pay, the tax assessed against it for the year 1905. That in ad-

dition ther to, the various organized cities, towns and villages through which defendant's lines of railway run, have in like manner and by authority of the constitution and laws of the State of Texas, assessed and levied against defendant's property situated in such cities, towns and villages, respectively, the taxes authorized to be levied by them, and each of them, which said taxes so levied and assessed, defendant will be compelled to pay and will pay for the year 1905. That under and by virtue of the same provision of the law by which defendant is assessed the property of other tax payers situated in said counties through which defendant's lines of railway run, respectively, have been assessed and the assessments approved and equalized in the same manner and form as the property of defendant, and the said assessment, approval and equalization thereof has become final as in the case of defendant's property aforesaid; and that by like proceedings in the cities, towns and villages through which defendant's lines of railway run, the property of other tax-payers, subject to taxation has been assessed and taxes levied thereon for city purposes. That by the proceedings aforesaid, by the action and the judgment of the assessors and boards of equalization of the respective counties and of the officials of the cities, towns and villages and independent school districts aforesaid, the valuation of defendant's property and of the property of all tax-payers therein situated, respectively, has been determined and fixed for taxation, the value thereof has been equalized in accordance with law, and is now fixed and established, and the burden of taxation and of the expense of government has been determined, equalized, apportioned, fixed and established in proportion to the value of the property so rendered, assessed, and equalized, and the same is final and conclusive. That defendant's property for the calendar year of 1905 has been so assessed, and said assessment approved and equalized as follows:—The G. H. & S. A. Ry. Co. at the sum of

$9,010,369.50 for county and State taxes; that for independent school districts it has been in like manner assessed at the sum of $2,274,185.00, and for cities, towns and villages at the sum of $822,565.00; the N. Y. T. & M. Ry. Co. for County and State purposes $1,188,340.00, for school districts $331,349.00; for cities $23,260.00. The G. W. T. & P. Ry. Co. for County and State purposes $839,830.00, for school districts $92,200.00, for cities $74,-455.80, for school district $230,160.00, for cities $128,250.00. The G. H. & N. Ry. Co. for County and State purposes $407,575.00, for school districts $230,160.00; for cities $128,250.00; all of which will more fully appear from the attached Exhibit B. showing the assessment of that portion of property situated in each county, together with the apportionment of rolling stock, etc., which is prayed to be taken as a part hereof, as though set out at length herein.

That the assessed valuation of defendant's property has been approximately as herein set out for the last ten years next immediately preceding 1905, and taxes of the State, County, City, and independent school district paid thereon. That for all of the years since defendant has been a corporation it has paid taxes legally assessed against it as aforesaid to the State of Texas, and for the several counties through which it runs as well as the several cities and independent school districts through which it extends; and that for the year 1905, it will pay its due proportion of all taxes due by it, and will thereby bear its proportionate burden of taxation on the value of its property compared with the taxation and burdens borne by other tax-payers situate in the respective counties where its property is situated, and has thereby borne, and is bearing, its proper and proportionate burden of the expense of government as apportioned, fixed and established by the authorities of the State of Texas, and it says that the attempted levy of one per cent. tax upon the gross receipts of defendant by

said gross tax receipt bill is an attempted unequal, unjust and arbitrary discrimination in taxation against defendant and other railway corporations of the State, and in favor of other taxpayers and other property of said State, and is therefore void because it is in violation of the fourteenth amendment to the Constitution of the United States, and is in violation of the constitution of the State of Texas, and especially in violation of Section 1, of Article 8, which provides that taxation shall be equal and uniform ; that all property in this State, whether owned by natural persons or corporations other than municipal, shall be taxed in proportion to its value, which shall be ascertained as provided by law ; and is also in violation of the further provisions of said Section 1, Article 8, of the Constitution of Texas, which authorizes the Legislature to tax incomes both natural persons and corporations, other than municipal, because said gross receipts tax bill does not levy or purport to levy and the other statutes of the State of Texas do not levy or purport to levy an equal and uniform tax on incomes of both natural persons and corporations other than municipal, or upon the gross receipts of both natural persons and corporations other than municipal (Sub. Par. 2, Par. VII., R. 17-20).

5. That defendant is a railroad corporation and common carrier engaged in the business of interstate commerce by transporting freight, passengers, baggage, express matter and mails by itself and its connections between points in Texas and points in other states of the United States and foreign countries, and is an interstate post road engaged in the carriage of inter-state mails by contract with the United States Government, and engaged in carrying the mails for said United States Government from points within this State. That all of its property is situated in the State of Texas, as hereinbefore stated, and has been assessed and the taxes paid thereon in

proportion to its value, for the years preceding 1905, and has been in like manner assessed and the taxes paid for the year 1905, as hereinbefore fully set out; whereby it has borne its proportionate burden of taxation in proportion to the value of its property as aforesaid. That the tax provided for in said Gross Receipts Tax Bill is in addition to the tax aforesaid, and is a tax in addition to that for which defendant is liable in proportion to the value of its property. That same is an attempt to add to the taxation of defendant's property the burden of a tax on the privilege of using, conducting and operating an instrumentality of interstate commerce, and is therefore unconstitutional and void and in violation of the Constitution of the United States and the provisions thereof which confer upon Congress the power to regulate commerce with foreign nations and among the several states and to establish post-offices and post roads. That for the year ending June 30, 1905, defendant received from the United States Government, for carrying United States Mails, the sums following: The G. H. & S. A. Ry. Co. $129,000.00; the G. H. & N. Ry. Co. $6,500.00; the N. Y. T. & M. Ry. Co. $12,000.00; the G. W. T. & P. Ry. Co. $5,000.00, and that it is beyond the power of the State of Texas to impose a tax upon said receipts, for that the same is taxing an agency of the government of the United States regulating, obstructing and interfering therewith. (Par. VII., (3), R. 20.).

6. That in addition to the taxes imposed under the assessed valuation of defendant's property herein above set out, defendant has been compelled to pay, and is paying, franchise, or occupation taxes, as provided by act approved March 1, 1905, to which as appears in acts of the Twenty-ninth Legislature, Chapter 19, page 21, reference is here made, said bill imposing a tax of one dollar on each two thousand dollars, or fractional part thereof, of

the authorized capital stock of corporations up to and including one hundred thousand dollars and one dollar on each twenty thousand dollars, or fractional part thereof, of said stock in excess of one million, and up to and including ten million dollars, and one dollar of each fifty thousand dollars or fractional part thereof, in excess of ten million dollars, such tax not to be less than ten dollars in any case. That under the provisions of said act, defendant has been compelled to pay franchise tax as follows:—

The G. H. & S. A. Ry. Co.	$997.00
The G. W. T. & P. Ry. Co.	630.00
The N. G. T. & M. Ry. Co.	190.00
The G. H. & N. Ry. Co.	90.00

That to compel defendant in addition to said taxes and the taxes hereinabove referred to, under the pretense of paying an occupation or privilege tax, to pay the ruinous and confiscatory amounts demanded in said Gross Receipts Tax Bill, will be to deprive it of its property without due process of law, and to deny it equal protection of the laws, contrary to Section 1, Article 14 of the amendments to the Constitution of the United States. (Sub. Par. 7, Par. VII., R. 21-22).

7. That in addition to the taxes which defendant will be compelled to pay under and by virtue of the assessment hereinabove set out and the franchise or privilege tax referred to in the paragraph next preceding, defendants have been compelled to pay by the State of Texas a tax of one per cent. on their gross passenger revenues earned within the State of Texas for the year ending June 30th, 1905, to-wit: The aggregate sum of $12,454.00. That said passenger receipts will likewise be included in the gross receipts taxes in said Gross Receipts Tax Bill, and defendant says that to again impose a tax of one per cent. upon such receipts as provided

in said bill, is not that equal and uniform taxation provided for in Section 1, Article 8, of the Constitution of the State of Texas, and it deprives defendant of the equal protection of the law, contrary to Section 1, Article 14, of the amendments to the Constitution of the United States. (Sub. Par. VII., R. 22.).

8. Defendant is advised that plaintiff will contend that said tax as imposed by said act of the Legislature is an occupation tax but defendant protesting that same is in truth and in fact a property tax and was so intended by the Legislature, says that if the same is an occupation tax, it is a tax upon a privilege or occupation of conducting an inter-state and foreign business, and of performing a function of the Government of the United States delegated to it by such government, to-wit, the transportation of the United States mails, state and inter-state, and as such is invalid and void. That defendant having already been taxed, as hereinabove alleged, under the general rate of *ad valorem* taxation in proportion to the value of its property, said tax herein sought to be imposed, imposed upon defendant, in addition to such *ad valorem* taxation, a burden of taxation more than twice as great as the taxation imposed under the regular *ad valorem* rate and such additional burden of taxation being collected from defendant's receipts from inter-state and foreign commerce is contrary to the third paragraph of section eight Article one of the Constitution of the United States, providing that Congress shall have the power to regulate commerce with foreign nations, and among the several states and with the Indian Tribes. (Sub. Par. 13, Par. VII. R. 25.)

9. That if said tax should be considered as an occupation tax, the same is in violation of section two, article eight, of the Constitution of the State of Texas, which provides, that "all occupation taxes shall be equal and uniform upon the same class of subjects

within the limits of the authority levying the taxes;" in this, that said tax is not laid upon other occupations of the same class. That other public service transportation companies being public common carriers are not subject thereto. That no similar tax is laid upon street railway companies, or electric inter-urban railway companies transporting freight and passengers, or upon common carriers such as vessels and boats upon the rivers, canals, bayous, lakes or bays of said State and in the Gulf of Mexico between the Ports of said State, with each and all of whom defendant has been, is, and will be in active competition in the carriage of freight, passengers and baggage between points within this State as as well as in the carriage of inter-state and foreign commerce and that said competition is substantial, applying to and affecting a large proportion of defendant's business as defendant has been and will be compelled to carry for the same rates charged by such other carriers, and that such competition with such other common carriers affects in the manner aforesaid a large proportion, probably about one-half, of defendant's business; that if an occupation tax, same is unequal and discriminatory and therefore contrary to said Section 2, Article 8, of the Texas Constitution, for the reason that the Texas & Pacific Railway Company whose line extends from El Paso on the Western border of Texas, where it connects with complainant's road, through many of the largest cities of Texas, and through Meskin [Waskoni] in the eastern boundary of said State through the State of Louisiana to the City of New Orleans, and which does a large business, state, inter-state and foreign in direct competition with complainant, is not subject thereto, and for the same reasons said act deprives defendant of the equal protection of the law contrary to the 14th Amendment to the Constitution of the United States. That by the exception of such other carriers from

said tax or any similar tax, they, if said one per cent. tax is enforced, will be given an unfair advantage. That each and all of said public common carriers, to-wit, interurban electric car lines, sleeping car companies, express companies, boats and vessels, each and all carry passengers, freight and baggage in the same manner as defendant, and they cannot reasonably be classified as a different class from this defendant. That the tax laid upon the gross receipts of sleeping car and express transportation companies is in lieu of and not in addition to all other taxation of an *ad valorem* nature, as is the case with this defendant. That such tax is not intended in good faith as an occupation tax, but is in truth and in fact a false and fraudulent scheme and device under the guise and pretense thereof, to levy in addition to the *ad valorem* tax now imposed by law, as above alleged, an additional, unreasonable and confiscatory burden of taxation, out of all due proportion to all other occupation taxes imposed by law and to the amount and burden of taxation imposed upon other persons, corporations and property to such extent that the same is unreasonable, unjust, arbitrary and capricious and is double, unequal, unjust, un-uniform taxation contrary to section one of article eight of the Constitution of the State of Texas and contrary to section nineteen of article one of the Constitution of the State of Texas, which provides that no citizen of this state shall be deprived of life, liberty, or property except by due course of the law of the land, and contrary to section one of the fourteenth amendment to the Constitution of the United States, which provides that no state shall deprive any person of his property without due process of law or deny to any person within his jurisdiction the equal protection of the law. The defendant's railway at the times alleged herein and for a long time prior thereto and now, extends in and through

organized counties, cities, and towns, chartered and organized, both by special charter and under the general law of this State, in part as follows :—

The G. H. & S. A. Ry. Co. eighteen counties and twenty cities and towns;

The G. H. & N. two counties and two cities and towns;

The G. W. T. & P. Ry. Co. five counties and five cities and towns;

The N. Y. T. & M. Ry. Co. five counties and five cities and towns.

That each of said counties, cities, and towns in the State of Texas through which lines of railway extend and are operated is authorized under the Constitution and laws of this State, to levy an occupation tax in an amount equal to one half of that levied by the State of Texas. That if said act of the Legislature should be construed as levying an occupation tax, each of said counties, cities, and towns will assert the right to collect from this defendant a tax of one half of the amount levied and herein sought to be collected by the State of Texas. That said tax so levied would be confiscatory in amount and character and together with the tax sought under said bill to be collected by the State, would burden, hinder and obstruct commerce between the states and with foreign nations, contrary to the provisions of section eight, article one of the Constitution of the United States, and would be so grossly excessive and discriminatory in its character as to amount to the confiscation of defendant's property, contrary to section seventeen of article one of the Constitution of the State of Texas, which provides that no person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person, and contrary to the provision of section nineteen of article one of the Constitution of the State of

Texas, which provides that no citizen of this State shall be deprived of life, liberty or property except by due course of the law of the land, and in violation of section four of article four of the Constitution of the United States, which guarantees to each state a republican form of government, and in violation of section one of article eight of the Constitution of the State of Texas, which provides that taxation shall be equal and uniform and upon the same class of subjects and in contravention of section one of article fourteen of the amendments to the Constitution of the United States which provides that no state shall deprive any person of life, liberty or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the law. (Sub. Par. 14, Par. VII., R. 25-27.)

10. That defendants were chartered on or about the dates above alleged, with power to do and perform all and singular the acts and things incident to the transaction of the business of a railroad company under the General Laws of the State, including the transportation of passengers and freight, state and interstate, which powers and franchise were in full force and effect at the time of the passage of said act and are now in force. That under said charter and under the Constitution and laws of this State, said defendant is authorized and compelled to pursue the occupation of conducting a railroad as a common carrier of freight and passengers. That it was chartered for and can pursue no other business. That said charter constitutes and is a contract by and between the State of Texas and defendant, under which in consideration of the burdens then and there assumed by defendant, the State of Texas extended to it the privilege and franchise of exercising the rights conferred in said charter and by the laws of this State. That the burdens of taxation imposed by this bill are so extraordinary in amount and

unequal, unusual and confiscatory in character and not being authorized by the laws in force at the time of the issuance of said charter, are such as were not contemplated therein, and operate to impair the obligation of said valid contract, contrary to the provisions of section ten, article one of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, and contrary to section sixteen of article one of the State of Texas, which provides that no law impairing the obligation of contracts shall be made. (Sub. Par. 15, Par. VII. R. 28.)

11. That said act of the Legislature is contrary to and in violation of Article 8, Section 1, of the Constitution of the State of Texas, in this, that said tax is intended for, and is a tax upon the gross receipts of defendant's corporation, and is in truth and in fact an income tax, that it was not contemplated by Section 1, of Article 8, of the Constitution of the State of Texas, that property should be taxed, and that at the same time the income arising from the use of said property should likewise be taxed. That the right-of-way, road-beds, railway tracks, depots, warehouses, terminal facilities, rolling stock, franchises and all appurtenances of defendant are, as hereinbefore particularly set out, assessed and taxed at the same rate of taxation as other persons and corporations in the State, and that defendant's income, as hereinabove specifically set out, arises from the use and operation of the property aforesaid, and to tax also such income is double, unequal, and discriminatory taxation, and is not such an income tax as was contemplated by said section in this, that the income there referred to is not the income arising from the use of property already taxed under the general taxation laws applicable to all persons or corporations in the state, but to such incomes as do not arise from the use of taxable property and

that under said Section 1, Article 8, of the Constitution of the State of Texas, an income tax, if imposed, must be imposed upon all natural persons or corporations other than municipal corporations, and said bill does not, nor does any other law of the State of Texas, provide for an income tax, either upon natural persons upon other than a few classes of corporations ; but to the contrary, there is no income tax imposed upon natural persons ; and more than ninety nine per cent. of the corporations doing such business in this State are exempted from the payment of such tax. Therefore said act is in violation of said Section 1, Article 8, of the Constitution of the State of Texas and is in violation of Section 1, Article 14, of the amendments to the Constitution of the United States, in this, that defendant is hereby deprived of its property without due process of law, and is denied the equal protection of the law. (Sub. Par. 18, Par. VII., R. 29.).

12. Defendant further shows that by the provisions of said bill, it is denied the equal protection of the law guaranteed by Section 1, Article 14, of the Amendments to the Constitution of the United States, in this, that thereby a tax of one per cent. on its gross income is imposed, while by section 19, Article 8, of the Constitution of the State of Texas, incomes from lands used for farming purposes are exempt from taxation, said Section 19, being as follows :—

> " Farm products in the hands of the producer and family supplies for home and farm use are exempt from all taxation until otherwise directed by a two-thirds vote of all the members elect to both houses of the legislature."

That the income from farming lands owned by individuals and corporations constitutes eighty per cent. at least of the wealth produced in the State of Texas, and that to exempt such property

from taxation, and to tax incomes from lands and property owned by railway corporations is to deprive them of the equal protection of the law guaranteed them by the Federal Constitution. (Sub. Par. 19, Par. VII., R. 29–30.).

By other special exceptions, it was urged that those clauses of the Act of the Legislature here involved imposing penalties to the extent of $200.00 per day for each day that plaintiffs in error refused to pay taxes demanded, together with the 10% penalty, were void as in contravention of the Constitution of the State of Texas and of the United States. These exceptions were sustained. (Judgment of the Court, R. 38).

It was also urged by special exception that inasmuch as under the Constitution of the State of Texas, the Act of the Legislature involved became operative 90 days after adjournment, to-wit, on July 15, 1905, the State was not in any event entitled to recover one per cent. of the gross receipts of each of the plaintiffs in error for the year ending June 30, 1905, but for only such proportion thereof as the time from July 15, to the end of the year bears to the entire year. The Act became effective on July 17, 1905. This exception was sustained by the Court. (R. 38).

The point was also raised by special exception that the recovery of the State should be limited to one per cent. of the receipts derived from the transportation of freight, passengers and baggage only, and not those receipts derived from other sources. This exception was likewise sustained by the Court. (R. 38).

It was shown upon the trial of the cause that the reports made by the several defendants, plaintiffs in error here, of earnings demanded under the terms of the Act had been made to the Comptroller of Public Accounts, who had made the assessment of one per cent. upon the total receipts for the fiscal year ending July 30th, 1905, had made due report thereof to the Treasurer, had requested

the Attorney General to bring suit, and that all of the technical prerequisites to the right of suit upon the part of the State had been complied with. (Statement of Facts, R. 44–56.)

It was also shown that each of the defendants (plaintiffs in error here) were incorporated as common carriers of freight and passengers prior to June 30, 1904, and that they, and each of them, were at all times involved engaged in the transportation of freight, passengers, etc., as common carriers by rail, both state and inter-state. That each of them had rendered for taxation in all the counties, cities, towns and villages and school districts through which its line of railroad extended and in which it owns property for State, county, municipal and school purposes, all of its property, real and personal, subject to taxation under the laws of the State of Texas. That this property had been duly assessed and equalised for taxation by the proper legal authorities, it being agreed that the allegations of the answer in this respect were true. That these properties had been so equalized and taxed for prior years, and that the tax thereon had been paid, and that these properties as so assessed and equalized for taxation purposes were taxed and the taxes paid at the regular *ad valorem* rates of all other property tax-payers in the State of Texas (R. 58).

It was shown that the Galveston, Harrisburg & San Antonio Railway Company extends from the City of Galveston through that of Houston and San Antonio to the cities of El Paso and Eagle Pass on the Mexican border, connecting at various points with other trunk lines in the State of Texas, and that it, together with its co-defendants, the Gulf, Western Texas & Pacific Ry. Co., The New York, Texas & Mexican Ry. Co. and the Galveston, Houston & Northern Ry. Co., whose properties it acquired in August, 1905, and prior to suit conducted the business of common carriers of freight and passengers, etc., state, inter-state and international.

That the receipts of each of the said companies for the year involved, to-wit, the fiscal year ending June 30, 1905, were as follows:—

The G. H. & S. A. Ry. Co.,	
Receipts from inter-state traffic	$5,209,389.79
" " intra " "	1,578,744.11
" incapable of apportionment between inter- and intra-state traffic:	
Mail	129,160.22
Express	78,752.93
Switching	57,673.09
Extra Baggage	18,068.56
Car Service	293,792.73
Locomotive Mileage	106,877.04
Total	$7,472,458.47
The N. Y. T. & M. Ry. Co.,	
Receipts from Interstate traffic	$181,020.80
" " Intra " "	281,556.09
Receipts incapable of apportionment between inter- and intra-state traffic:	
Mail	12,019.87
Express	8,012.80
Extra Baggage	1,199.12
Switching	586.75
Car service	21,626.76
Locomotive mileage	3,435.98
Total	$509,458.17

The G. W. T. & P. Ry. Co.

Receipts from inter-state traffic	$31,121.81
Receipts from intra-state traffic	98,142.32
Receipts incapable of apportionment between inter- and intra-state traffic :	
Mail	5,371.17
Express	5,984.30
Extra Baggage	841.33
Switching	1,056.15
Car Service	11,155.43
Locomotive mileage	1,838.50
Total	$155,511.01

The G. H. & N. Ry. Co.

Receipts from inter-state Traffic	$946,057.49
Receipts from intra-state traffic	252,514.95
Receipts incapable of apportionment between inter- and intra-state traffic :	
Mail	6,475.28
Express	5,840.13
Extra Baggage	1,049.35
Switching	18,132.75
Car Service	14,717.12
Locomotive mileage	3,330.40
Total	$1,248,117.47

See "Exhibit A," to answer of plaintiffs in error, (R. 30–34), which, it is agreed, states the facts. (R. 58.).

It also shows that each of the defendants had paid its franchise taxes for the year beginning May 1, 1905, and ending May 1, 1906, imposed by the Act of the Legislature of March 1, 1905, as follows :

The G. H. & S. A.	932.00
The N. Y. T. & M. Ry. Co.	190.00
The G. W. T. & P. Ry. Co.,	630.00
The G. H. & N. Ry. Co.	$90.00

(R. 60.).

It was also shown that each of the defendants, plaintiffs in error here, had paid to the State of Texas a tax of one per cent. on its gross receipts from passenger travel within the State of Texas from July 1, 1904, to June 30, 1905, both dates inclusive, as follows:—

The G. H. & S. A. Ry. Co.	$5,656.52
The G. H. & N. Ry. Co.	897.88
The G. W. T. & P. Ry. Co.	487.22
The N. Y. T. & M. Ry. Co.	1,011.06

(R. 61.).

It was also shown by the testimony of G. R. Cottingham, Auditor, that the amounts of the receipts of each of the above companies from state and inter-state commerce was as set out above, and that the books of said companies were so kept as that that portion of such receipts referred to as unapportioned were incapable of apportionment between inter-state traffic and intra-state traffic. (R. 63.).

It was also shown by the testimony of C. K. Dunlap, General Freight Agent of the G. H. & S. A. Ry. Co., and by A. P. Fondra, Assistant Freight Agt. of the Gulf, Colorado & Santa Fe Ry. Co., that there was a large transportation business done by common carriers by water in the State of Texas in direct competition with the railroad carriers. Said Dunlap testified that the Houston &

Direct Navigation Company is a corporation engaged in the transportation of freight by water from Houston to Galveston and intermediate points, and that it transacted a large freight business, by him particularly described; that a large transportation business in oil, lumber and rice is done by persons and corporations owning steamships, barges and schooners between Port Arthur and New Orleans, and between Lake Charles, La., and Port Arthur, Sabine Pass, Orange, Beaumont, and Galveston, and between Galveston and Velasco at the mouth of the Brazos, Palacios on Matagorda Bay, Corpus Christi, and Brownsville, and between Galveston and all of these points; and that a large portion of the railroad freight rates in this State were directly affected by and made upon the water rates there conducted. (R. 67, 70–83.).

It was also shown that a large transportation of passengers and express is done by electric companies not subject to the Act involved, to-wit, by the North Texas Traction Company, an electric line of railway between Dallas and Fort Worth, also an electric line between Sherman and Denison, and other electric lines (R. 100–101).

By the testimony of H. G. Askew, Expert Accountant of the Railroad Commission of Texas, (R. 109.), it was shown that each of the defendant companies, plaintiffs in error here, were directly at ports of entry and by connections with other railway companies both in the State of Texas and upon the border thereof, were during the time involved engaged in a large commerce, both state and interstate, from which the receipts taxed were derived.

It was also shown that the Texas & Pacific Ry. Co., which extends entirely across the State of Texas from its eastern border to El Paso on the West is a federal corporation deriving its powers and franchises from Acts of Congress, (R. 57.), being incorporated under

Act of Congress, approved March 13, 1871, and acts amendatory thereof. (R. 57.).

The Trial Court held that those portions of the Act of the Legislature in controversy imposing a penalty of $200.00 per day from November 1st, 1905, for non-payment of the tax, and 10% penalty were void, as in contravention of the Constitution of the State of Texas and of the United States; and that the State should not recover same.

It was also held that the Act could not have a retrospective effect, and that inasmuch as it took effect July 15, 1905, the State was entitled to recover, not one per cent. upon the receipts of the respective railway companies for the year ending June 30, 1905, but that the tax, being an annual tax, the State could recover for only the unexpired part of the year, from July 15, 1905, onward, that is to say, for 169/365 of said one per cent.

It was also held that inasmuch as the State had demanded the tax for the entire year, and had declined to receive less than the amount demanded, it was not entitled to recover 10% penalties for failure to pay on October 1, 1905.

It was further held that the receipts upon which the 1% tax should be estimated were receipts only from the transportation of passenger, freight and baggage, mail matter and express matter, and that all other receipts should be excluded from the computation.

The Court further held that the Act did not constitute an interference with inter-state commerce, and that it did not deprive plaintiffs in error of due process of law or deny them equal protection of the law, and that it was not therefore in contravention of the fourteenth amendment to the Constitution of the United States, or of Article 1, Section 8, of the Constitution of the United States, which provides that Congress shall have power to regulate com-

merce with foreign nations and among the several states and the Indian Tribes.

It accordingly over-ruled all of the exceptions of plaintiffs in error hereinabove set out, holding against plaintiffs in error on all federal questions, and entered judgment against plaintiffs in error as follows :

The G. H. & S. A. Ry. Co.	$32,743.35
The N. Y. T. & M. Ry. Co.	2,242.80
The G. W. T. & P. Ry. Co.	659.86
The G. H. & N. Ry. Co.	5,695.40

Each of said sums bears 6% interest from the date of said judgment, to-wit, December 8, 1905. The said sums so adjudged being 169/365 of 1% of the total receipts of each of said companies, respectively, for the year ending June 30, 1905, derived from the receipts of said companies, respectively for the year ending June 30, 1905, from the transportation of passengers, freight, baggage, mail and express matter, both inter-state and intra-state. (See Judgment of the Court, R. 38–39.).

The reasons controlling the Court's judgment are set forth in the conclusions of law in the companion case of the State of Texas vs. Texas & Pacific Railway Company, directed to be considered as a part of the record in this case. (R. 41–43).

From this judgment, notice of appeal having been given and supersedeas bonds having been executed, each of the plaintiffs in error appealed to the Court of Appeals of the Third Supreme Judicial District at Austin, filing among others the following assignments of error :

1. The Court erred in overruling the defendant's general demurrer to the plaintiff's petition.

2. The Court erred in overruling sub-division 2 of defendant's special exception III to plaintiff's petition, which was as follows:

> "Said act of the Legislature in said petition referred to is unconstitutional and void, for that the same is in conflict with, and in contravention to the third paragraph of Section 8, Article 1, of the Constitution of the United States, which provides 'that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian Tribes' in this, that said Act seeks to levy and does levy a tax directly upon defendant's receipts from inter-state and foreign commerce, and regulates, obstructs, and hinders commerce between the several states and with foreign nations" (R., 122).

3. The Court erred in overruling sub-division 3 of defendant's special exception III to plaintiff's petition, which was as follows:—

> "That said Act is violative of and in contravention of the fourteenth amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, in this, that said Act provides that the taxes herein levied shall be in addition to all other taxes levied by law, and the Court being judicially informed that the property of this defendant has been and is now assessed for taxation upon an *ad valorem* basis and rate as all other citizens of the State of Texas, to now levy upon it, an additional tax of one per cent. upon its gross receipts, when a like tax is not levied on other citizens of the State of Texas, is an unequal, unjust and arbitrary discrimination in taxation against this defendant, contrary to said Section 1, Article 14, of the amendment to the Constitution of the United States" (R. 122–123).

4. The Court erred in overruling sub-division 7 of defendant's special exception III to plaintiff's petition, which was as follows:

> "Said Act is in contravention of Section 1, of the 14th Amendment to the Constitution of the United States, providing that no State shall deny to any person within its jurisdiction the equal protection of the law, in this, that this defendant and other railroad companies are selected from among the masses of persons and property in the State, and certain taxes are imposed upon it, which are not imposed upon other persons and property in the State, and the reports of certain persons, officers and agents required by said Act are given the effect of an absolute assessment of said property for taxation, whereas, under the laws of said State of Texas, no tax of the same or similar nature is imposed upon other persons and corporations and the property of all other persons and corporations is assessed in proportion to its value and not at an absolute, fixed and mathematical sum, to be arbitrarily determined by a single officer, to-wit, the Comptroller of the State of Texas" (R. 123–124).

5. The Court erred in overruling sub-division 22 of defendant's special exception III to plaintiff's petition, which was as follows:—

> "Said tax imposed in said Act is violative of Section 1, Article 14, of the amendments to the Constitution of the United States, in this, that it deprives defendant of the equal protection of the law, no like income tax being imposed upon other persons and corporations in said state" (R. 126).

6. The Court erred in overruling sub-division 23 of defendant's special exception III to plaintiff's petition, which was as follows:—

> "That said tax imposed by said Act of the Legislature denies defendant the equal protection of the law contrary to said Section 1, Article 14, of the amendment to the Constitution of the United States, in this, that thereby a tax of one per cent. on its gross income is imposed, while no like tax is imposed upon other persons and corporations in said State, and by Section 19 of Article VIII of the Constitution of Texas, incomes from lands used for farming purposes are exempted" (R. 126).

7. The Court erred in overruling sub-division 24 of defendant's special exception III to plaintiff's petition, which was as follows:—

> "That said Act is violative of Section 10, Article 1 of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, in this, that it appears upon the face of plaintiff's petition that defendant is a corporation chartered under the laws of the State of Texas, as a common carrier of freight and passengers, with the power to do and perform all and singular the acts and things usually incident to the transaction of the business of a [railroad] corporation; that said charter constitutes and is a contract between the State of Texas and defendant, under which the State of Texas extended to it the privilege and franchise conferred in said charter, and that the imposition of an unequal, unusual and confiscatory burden of taxation imposed by said bill is such as was not contemplated in such contract, and operates to impair the obligation thereof" (R. 126).

8. The Court erred in overruling sub-division 28 of defendant's special exception III to plaintiff's petition, which was as follows:—

> "That it appears upon the face of said Act, and of plaintiff's petition, that same is violative of Section 1, of Article 14, of the Amendments to the Constitution of the United States, in this, that it imposes upon this defendant and other railway corporations similarly situated a burden of taxation which is unequal, unreasonable and discriminatory, and such as is not imposed upon other persons, citizens or tax payers of the State of Texas, and therefore deprives defendant of the equal protection of the law" (R. 127).

9. The Court erred in overruling sub-division 29 of defendant's special exception III to plaintiff's petition which was as follows:

> "Under the Constitution and laws of the State of Texas and of the laws of the United States, defendant is authorized,

empowered and required to connect with railroads of other states, and is engaged in the transportation of interstate and foreign commerce, and as such is an instrumentality of interstate commerce, and the Act alleged, if considered as an occupation or privilege tax, levies on defendant a tax far in excess of and in addition to the regular *ad valorem* tax imposed under the general laws of the State of Texas, and is a regulation, hindrance and obstruction to interstate commerce contrary to the third paragraph of Section 8, Article 1 of the Constitution of the United States, which provides that 'Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian Tribes'" (R. 127).

10. The Court erred in rendering judgment for the plaintiff for any amount, as it appeared from the uncontroverted evidence that a large part of the receipts of defendant for the year ending June 30, 1905, upon which the tax awarded the plaintiff by the judgment was based, were receipts derived by the defendant from the transportation of freight, passengers, baggage, mail and express between points in different states and territories of the United States and between points in the United States and foreign countries, such receipts thus being derived from commerce among the states and foreign countries, and such transportation being commerce between the States and foreign countries and the Court having held that the Act of the Legislature applies to such interstate and international receipts, and as applied to the same the said Act being in contravention of that clause of the Constitution of the United States conferring upon Congress the authority to regulate commerce among the states and with foreign countries, the court should have held that the Act was void, there being no provision in the Act for the assessment or collection of the tax on receipts only from transportation and other sources within the State (R. 127-128).

11. It appears from the uncontroverted evidence that a large part of the receipts of the defendant were derived from inter-state and international transportation, and the Act of the Legislature as construed by the Court applies to and levies a tax upon such receipts in a sum equal to one per cent. thereof, which is, in effect, a regulation of interstate and foreign commerce contrary to the clause of the Constitution of the United States conferring power to regulate such commerce upon Congress, therefore the court erred in including in its judgment a sum equal to $\frac{1}{3}\frac{1}{6}\frac{1}{5}$ths of one per cent. of such receipts so derived from international and inter-state commerce (R. 128).

12. It appearing from the evidence that some of the items of the receipts of the defendant for the year ending June 30, 1905, from transportation could not be divided between state and inter-state and international commerce, the court erred in including in its judgment in favor of the plaintiff a sum equal to 169/365 of one per cent. of such receipts (R. 128).

13. The Court erred in rendering judgment for the plaintiff, because it appeared from the undisputed evidence that the defendant has always paid, and will pay for the present year, the taxes assessed against all of its property, which property has been rendered and assessed and its tax value ascertained and equalized by the tax assessors and boards of equalization of the State in the same manner as such other property situated within the State and in accordance with the Constitution and laws of the State; and therefore defendant cannot be subjected to an additional tax in any form to which other property is not subjected, or to which other property owners are not subjected, since defendant being engaged in inter-state and foreign commerce and having been so engaged during the year ending June 30, 1905, and since, same would be a burden upon

inter-state and foreign commerce contrary to the Constitution and laws of the United States (R. 128).

14. The Court erred in rendering judgment for the plaintiff, because, where, as it here appears, a railway company chartered as such, the property of which can be devoted to no other use and which is compelled under the law, to dedicate its property to that use and to no other, had had that property, which includes its franchises, fairly assessed and valued for taxation in the same proportion to actual value as the property of other citizens of the State, and is now paying the same *ad valorem* tax on such property as other citizens of the State, and, in addition thereto, has paid a specific franchise tax, to impose upon such company under the guise of an occupation tax or otherwise, a burden of taxation more than double that imposed under the regular *ad valorem* tax levied on the property of all other citizens by general law and out of all due proportion to all other occupation taxes, is to deprive it of its property without due process of law, and to deny it the equal protection of the law, contrary to section I. of the 14th amendment to the Constitution of the United States (R. 129).

15. The Court erred in rendering judgment for the plaintiff, because the tax imposed, if considered as an occupation tax, deprives defendant of its property without due process of law, contrary to the provisions of the 14th amendment to the Constitution of the United States, in this, that it exacts an occupation tax for the right to use property constructed for a particular use, and without value for any other use, and compelled by the State to be used for that particular purpose, and no other—the right to use such property inhering in the property itself, and the State being without power to exact license or occupation tax therefor (R. 129).

16. The Court erred in rendering judgment for the plaintiff after holding the tax in question to be an occupation tax, because it appeared from the uncontradicted evidence that during the year ending June 30, 1905, and before and since that time, that a large part of the commerce of the State of Texas was conducted by common carriers by water in competition with defendant and other common carriers by rail, and that such competition by common carrier by water was and is real and substantial and to a very large extent affected the rates that were charged and could be charged by defendant and other common carriers by rail; and as the Act of the Legislature in question does not impose, and as no other Act of the State of Texas imposes a similar tax on such common carriers by water, therefore, the said Act of the Legislature, attempting to impose the tax in question upon defendant and other rail carriers was and is repugnant to the Constitution of the State of Texas, Section II., Article VIII., wherein it is provided that occupation taxes shall be equal and uniform upon the same class of subjects (R. 129).

17. The Court erred in rendering judgment for plaintiff, because it appeared from the evidence that The Texas & Pacific Railway Company which operated during the year ending June 30, 1905, and before and since, a very large number of miles of railroad in the State of Texas, and during all such time was engaged in the carriage of interstate and international and State freight, passengers, baggage, mail and express in active competition with defendant, and since the said The Texas & Pacific Railway Company is chartered by the government of the United States and is a federal corporation, it cannot be subjected by the State of Texas to the tax sought to be imposed on this defendant or its property by the Act of the Legislature in question; therefore such Act of the Legislature is contrary to Section II, Article VIII, of the Constitution of the State of Texas,

wherein it is provided that occupation taxes shall be equal and uniform upon the same class of subjects (R. 130).

18. The Court erred in rendering judgment for the plaintiff because it appeared from the evidence, that, prior to June 30, 1904, defendant was duly chartered and incorporated under the laws of the State of Texas without reservation of the authority on the part of the State or the Legislature of said State to alter, amend, or repeal the charter of the defendant; and it appeared that the defendant has heretofore paid and will pay the taxes as specified in the foregoing 25th and 26th assignments, therefore, to impose the additional exhorbitant and excessive tax sought to be imposed by the Act now in question, would impair the obligation of defendant's charter contract, contrary to the Constitution of the United States and of the State of Texas, each of which prohibits the Legislature of the State of Texas, or any authority purporting to act thereunder from passing any law or doing any act the effect of which would be to impair the obligation of a contract, and would deprive the defendant of property without due process of law, contrary to the 14th Amendment to the Constitution of the United States, and of the Bill of Rights of the Constitution of the State of Texas (R. 130).

19. The Court erred in rendering judgment for the plaintiff, because, if the tax levied by the Act in question be considered as an occupation tax, it is imposed upon the occupation of engaging in and carrying on interstate and foreign commerce, as well as the occupation of engaging in and carrying on State commerce, and in imposing an occupation tax for engaging in and carrying on interstate commerce, it is in violation of sub-division 3 of Section 8 of Article 1 of the constitution of the United States, giving Congress the power to regulate commerce with foreign nations and among the several states (R., 131).

20. The Court erred in rendering judgment for the plaintiff, because if regarded as imposing an occupation tax upon both the business of engaging in and carrying on interstate and foreign commerce and the business of engaging in and carrying on state commerce the act in question, by reason of the indivisibility of the two kinds of business and the inseparability of the one business from the other, is void as a whole (R. 131).

21. The Court erred in rendering judgment for the plaintiff, because if the Act in question be considered as imposing an occupation tax solely upon the occupation of engaging in and carrying on State Commerce, it is nevertheless in violation of sub-division 3 of Section 8 of Article I. of the Constitution of the United States, conferring upon Congress the power to regulate commerce with foreign nations and among the several states, since, in arriving at the amount of the tax, the receipts derived from interstate and foreign transportation as well as those derived from state transportation must be taken as a basis, thereby causing the tax to directly relate to and affect interstate and foreign commerce, and since the imposition of a tax equal to one per cent. of the gross receipts derived from interstate and foreign transportation is an impediment and obstruction to and a burden upon interstate and foreign commerce (R. 131–132).

22. The Court erred in rendering judgment for the plaintiff, because if the Act in question be considered as levying a tax solely upon the occupation to do business within the State, it is nevertheless in violation of sub-division 3 of Section 8 of Article 1 of the Constitution of the United States, conferring upon Congress the power to regulate commerce with foreign nations and among the several states, in that the burden of the same will necessarily fall on the interstate occupation, since defendant cannot renounce

its State occupation and pursue only its occupation as carrier of interstate and foreign commerce (R. 132).

23. The Court erred in rendering judgment for the plaintiff, because the tax attempted to be levied by the Act in question is in fact a tax upon the income of railroad corporations, derived from interstate and international commerce, and as such is a regulation of such commerce in violation of the third paragraph of Section 8 Article 1 of the Constitution of the United States (R. 133).

24. The Court erred in rendering judgment for any sum in behalf of the State, after holding that said Act imposed an occupation tax for pursuing the business of the carriage of passengers, freight, baggage, mail and express within the State of Texas, because under the terms thereof the various railroads subject thereto would be required to pay a tax based upon their earnings from both intra-state and inter-state and international commerce, and the evidence in the case shows that their earnings derived from intrastate business as compared with the total amount of their gross receipts from interstate and international business varies so greatly, that the effect would be to require different railroad companies to pay different percentages on their gross receipts from state business, which is in violation of Section 2, Article 8, of the Constitution of the State of Texas, and in violation of that part of Section 1, of the 14th Amendment to the Constitution of the United States, which provides that no state shall deprive any person within its jurisdiction of the equal protection of the law R. 133).

25. The Court erred in holding the Act of the 29th Legislature in controversy to be constitutional and rendering judgment in behalf of the State, because the evidence shows that the defendant has no

assets or property that has not heretofore been subject to taxation, and shows that it has paid its taxes thereon in the same proportion as other property and tax payers of the State have been required to pay and the imposition of the tax provided for in said Act is therefore an unjust and an arbitrary burden laid upon the defendant, in violation of Sections 1 and 2 of Article 8 of the Constitution of the State of Texas ; and of that portion of Section 1 of the 14th Amendment to the Constitution of the United States, which provides that no State shall deprive any person within its jurisdiction of the equal protection of the law, and that portion thereof which provides that no person shall be deprived of his property without due process of law (R. 134).

26. The Court erred in its first conclusion of law in holding that the statute referred to is not obnoxious to any provision of the Constitution of the United States, or of the Constitution of the State of Texas, and is a valid law except in certain particulars relating to penalties and to the payment of taxes calculated on gross receipts derived from car track rentals (R. 135).

27. The Court erred in its first conclusion of law in holding that the statute referred to, except in the particulars therein stated, is not obnoxious to any provision of the Constitution of the United States (R. 135).

28. The Court erred in its second conclusion of law in holding that the statute in controversy imposed an occupation tax on the defendant (R. 135).

On March 21, 1906, the Court of Civil Appeals for the Third Supreme Judicial District at Austin rendered its opinion to the effect that the Act of the Legislature approved April 17, 1905, here in controversy, levied a tax of one per cent. on the interstate re-

ceipts of plaintiffs in error, and was therefore an interference with interstate and foreign commerce and violative of Section 1, Article 8, of the Constitution of the United States, and that the said Act as a whole was therefore void. It accordingly reversed and rendered the case, adjudging that the State take nothing by its suit. (See opinion and judgment of the Court, R. 183-185).

The reasons controlling the judgment of the Court of Civil appeals is set forth in its opinion in the cases of the *G. H. & S. A. Ry. Co. et. vs. R. V. Davidson et al.*, the *T. & P. Ry. Co. vs. John W. Stephens*, the *G. C. & S. F. vs. R. V. Davidson et al.*, the *M. K. & T. Ry. Co. vs. John W. Stephens et al.*, the *St. L.-S. W. Ry. Co. of Texas vs. R. V. Davidson et al.*, which were suits for injunctions brought by the respective plaintiffs against John W. Stephens, Comptroller of the State of Texas, John W. Robbins, Treasurer of the State of Texas, and Robert Vance Davidson, Attorney General of the State of Texas, to enjoin each of them from taking any steps towards the enforcement of the Act of the Legislature of the State of Texas approved April 17, 1905, and here in controversy, in which cases the Court below having refused the injunctions, the Court of Civil Appeals reversed the cases and rendered judgment restraining the defendants, according to the prayers of the petition, the opinion in those cases being made a part of the record herein. (R. 148-182).

The State of Texas filed its motion for rehearing in the Court of Civil Appeals (R. 185-190) which was overruled by said court on April 25, 1906, (R. 191 to 194). The State thereupon filed its petition for writ of error to the Supreme Court of Texas. (R. 194-237). This application was by the Supreme Court of Texas granted on June 21, 1906. (R. 238).

That Court on November 7, 1906, reversed the judgments both of the Court of Civil Appeals and the District Court of Travis County, holding that the Act of April 17th, 1905, was not violative of either

Article 1, Section 8 of the Constitution of the United States as an interference with inter-state commerce, or of the 14th Amendment to the Constitution of the United States, as depriving plaintiffs in error of due process of law or of the equal protection of the law. It further held that the Act was not violative of any provision of the Constitution of the State of Texas, except in so far as penalties were denounced therein. It sustained the judgment of the trial court in refusing a recovery either for the 10% penalty or for the penalty of $200.00 per day after November 1st, 1905. It also sustained the trial court in holding that the State was not entitled to recover one per cent. upon the receipts of plaintiffs in error for the year ending June 30, 1905, but could recover only 169/365 thereof. It overruled the trial court in holding that the receipts upon which the tax was levied were only such as were received from the transportation of passengers, freight, baggage, mail and express matter; but held that the one per cent. should be calculated upon the receipts of the carrier from whatsoever source same might be derived, whether from transportation services or otherwise.

It accordingly entered judgment against plaintiffs in error and the sureties upon the supersedeas bonds for the following sums, to-wit :—

The G. H. & S. A. Ry. Co.	$34597.68
The G. H. & N.	5778.11
The N. Y. T. & M. Ry. Co.	2357.55
The N. W. T. & P. Ry. Co.	719.94

with interest on said sums at the rate of 6% from the 8th day of December, 1905. (See Judgment of the Supreme Court, R. 253.). The considerations governing the Court being stated in its opinion. (R. 233–252).

Plaintiffs in error filed motion for rehearing in the Supreme

Court of the State of Texas on November 17th, 1906, setting out all of the grounds, both State and Federal, relied on in the Court below and in the Court of Civil Appeals. (R. 254, 274).

The State of Texas also filed a motion for re-hearing. (R. 274–283).

Both of these motions were overruled December 5th, 1906. (R. 283–284).

The Plaintiffs in error thereupon filed application for a Writ of Error to the Supreme Court of the United States, which was duly allowed and prosecuted. (R. 284–290).

Plaintiffs in error assigned the following specifications of error :—

Specifications of Error.

The Supreme Court of Texas erred in the record and proceedings in this case, as follows (R. 290–296):

I.

The Supreme Court of the State of Texas, having construed the Act of the Legislature of the State of Texas, approved April 17th, 1905, entitled,

> "An Act, imposing a tax upon railroad corporations, the receivers thereof, and other persons, firms and associations of persons, owning, operating, managing or controlling any line of railroad in this state, for the transportation of passengers, freight and baggage, or either, equal to one per cent of their gross receipts, and providing for the collection and payment thereof; and repealing the existing tax on the gross passenger earnings of railroads,"

said Act imposing a tax upon railroads, including plaintiffs in error herein, equal to one per cent of their gross receipts, as embracing gross receipts from interstate and foreign commerce; erred, in holding that said statute, in so far as it included such receipts from interstate and foreign transportation, was not contrary to, and in violation of, that clause of Section 8 Article I of the Constitution of the United States, which provides that "Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes," for, by whatever name such tax may be called, whether an occupation, excise, franchise or income tax, the necessary effect of including one per cent of the receipts from interstate and foreign transportation in the ascertainment of the amount of tax was and is, to regulate, impede, obstruct, tax and place a burden upon such interstate and foreign commerce.

II.

It appearing from the record herein, that the plaintiffs in error, in common with other railroad companies in the State of Texas, have paid and would pay, *ad valorem* taxes on their respective properties under the laws of the State of Texas, to impose upon plaintiffs in error, in common with other railroad companies, a tax in the form of a tax equal to one per cent. of their gross receipts from foreign and interstate commerce, when no like tax is imposed upon other property owners, is necessarily, to regulate and place a burden upon interstate and foreign commerce, contrary to Section 8, Article 1 of the Constitution of the United States, which confers upon Congress the power to regulate such commerce; wherefore, the Supreme Court of the State of Texas erred, in holding that said Act of the Legislature, approved April 17th, 1905, imposing a tax upon railroad companies equal to one per cent. of their gross receipts, in so far as in ascertaining the amount of taxes to be paid thereunder, it included one per cent. of the gross receipt of such companies from the transportation of interstate and foreign commerce, was not contrary to, and in violation of, said Section 8, Article I., of the Constitution of the United States, conferring upon Congress the power to regulate commerce with foreign nations and among the several States, and with the Indian Tribes.

III.

The Supreme Court of the State of Texas erred, in holding that said Act of the Legislature of the State of Texas, approved April 17th, 1905, imposing a tax upon railroad companies equal to one per cent. of their gross receipts, in so far as said Act in the estimation of the tax required to be paid, included one

per cent. of the gross receipts of the railway companies, plaintiffs in error, from the transportation of interstate and foreign commerce, was not contrary to, and in violation of, Section 8, Article I, of the Constitution of the United States, which confers upon Congress the power to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.

IV.

The Supreme Court of the State of Texas, having determined that the tax imposed by said Act of the Legislature, approved April 17th, 1905, was an occupation tax, and that in ascertaining the amount of such tax, one per cent. of the gross receipts of the railway companies therein referred to from interstate and foreign commerce were, and are, to be included, and plaintiffs in error, in common with other railway companies of the State of Texas, being required and compelled by the Constitution [and laws] of the State of Texas to pursue the occupation of common carriers of intrastate freight and passengers, and being therefore unable to renounce such occupation, and being at the same time engaged in the common carriage of interstate and foreign commerce, the necessary effect of the tax imposed by said Act, and sought to be recovered in this suit, is to impose a burden and restriction on interstate and foreign commerce, and to regulate the same, in contravention of Section 8, Article I, of the Constitution of the United States, which confers upon Congress the power to regulate commerce with foreign nations, and among the several States.

V.

The Supreme Court of Texas erred in its judgment herein, because the assessment of a tax at a sum equal to one per cent. of the gross interstate and foreign earnings of plaintiffs

in error, is, in effect, an impediment to, and serious obstruction of, and a burden upon, interstate and foreign commerce, since plaintiffs in error and other railroad companies, in fixing their interstate and foreign rates, will necessarily consider that from the earnings of all such transportation, they must yield up to the state a sum equal to one per cent thereof; and because, if the State could demand one per cent of such receipts from interstate and foreign transportation, it could demand any larger percentage, and under this form of taxation, the State could practically, without limit, regulate or suppress interstate and foreign commerce, contrary to the provision of Section 8, of Article I, of the Constitution of the United States, which delegates to Congress the power to regulate traffic between the States and with foreign nations.

VI.

The Supreme Court of Texas erred in its judgment herein, for that: If the Act of the Legislature, approved April 17th, 1905, above referred to, be construed as imposing an occupation tax solely upon the occupation of engaging in State commerce, it is nevertheless in violation of Section 8, of Article I, of the Constitution of the United States, which confers upon Congress the power to regulate commerce with foreign nations and among the several states, for, in arriving at the amount of the tax, the receipts derived from interstate and foreign commerce, as well as those derived from State transportation, are taken as a basis, thereby causing the tax to directly regulate, relate to and affect interstate and foreign commerce, while the State, in arriving at the amount of an occupation tax, cannot take as a basis, matters such as interstate commerce which the State has no power to tax, as this would accomplish indirectly what the State is without power to do directly.

VII.

The Supreme Court of the State of Texas erred, in failing and refusing to hold that said Act of the Legislature of the State of Texas, approved April 17th, 1905, is violative of, and in contravention of, Section 1, of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws, in this: That it appears from the uncontradicted evidence herein, that during the year ending June 30th, 1905, and before and since that time, and during the entire period of time involved herein, a large portion of the commerce of the State of Texas was conducted by common carriers by water, and electric railways, in competition with plaintiffs in error and other common carriers by rail; that such competition by common carriers by water and electric railways, was and is real and substantial, and to a very large extent, affected the rates charged for transportation by plaintiffs in error and other common carriers by rail; that said Act, herein involved, does not impose, and no other Act of the Legislature of the State of Texas imposes a similar tax on such common carriers by water and electric railways, or upon any other common carriers, except common carriers by rail, and the same is therefore, unequal and discriminatory, as against plaintiffs in error and other railway companies, and deprives them, and each of them, of the equal protection of the law.

VIII.

The Supreme Court of the State of Texas erred, in failing and refusing to hold that the said Act of the Legislature

of the State of Texas, approved April 17th, 1905, and the tax thereby imposed, is invalid and void, for that: Plaintiffs in error are railway companies, chartered as such, with property which can be used for no other purpose, and which are compelled under the law, to dedicate their property to such use, and none other; that they have had such property, which includes their franchises, fairly assessed and valued for taxation, in the same proportion to actual value as the property of other citizens in the State of Texas, and are now paying the same *ad valorem* tax thereon, and for the year 1905, and for all prior and succeeding years, have paid and will pay to the State of Texas, taxes at the same rate and in the same proportion to actual value as other citizens of the State of Texas; and in addition thereto, have, under the laws of the State of Texas, paid and are required to pay a specific franchise tax; and to impose upon plaintiffs in error and other railway companies in the State of Texas—they, and each of them, being engaged in interstate commerce—under the guise of an occupation tax, franchise tax, income tax, or otherwise, a tax upon the receipts from and proceeds of the use of their properties thus taxed, a burden of taxation more than double that imposed under such regular *ad valorem* taxes levied upon the properties of other citizens of the State of Texas by the general law, and out of all due proportion to all other occupation taxes, as is shown by the uncontradicted evidence herein, operates to deprive, and does deprive plaintiffs in error, and each of them, of their property without due process of law, and denies to them, and each of them, the equal protection of the law, contrary to section 1, of the Fourteenth Amendment to the Constitution of the United States, and regulates, hinders and obstructs commerce between the States and with foreign countries contrary to the provisions of Section 8, Article I, of the Constitution of the United States which confers

upon Congress the right to regulate commerce between the State and with foreign countries.

IX.

The Supreme Court of the State of Texas, erred in failing and refusing to hold that said Act of the Legislature of the State of Texas, approved April 17th, 1905, and the tax thereby imposed, is in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person within its jurisdiction, of the equal protection of the law, in this: That said Act, as construed and enforced by the Supreme Court of the State of Texas herein, is held to be imposed as an occupation tax or franchise tax upon the intrastate business of plaintiffs in error, and under the terms of said Act, as so construed, plaintiffs in error, and other railway companies subject thereto, are required to pay a tax based upon their earnings, not only from the intrastate business taxed, but also upon their receipts from interstate transportation and international transportation, and the evidence herein showing without controversy, that the earnings of the various railway companies of the State of Texas, derived from intrastate business, as compared with the total amount of their gross receipts from interstate and foreign business, vary so greatly, that the effect of the enforcement of the Act as so construed, would be and is, to require different railway companies in the State of Texas to pay different percentages on their receipts from State business, for the right to pursue such business, it being a denial of the equal protection of the law to compel one railway company which does a small intrastate business, to pay an equal or a larger tax than a railway company, situated in the same state, which does a far greater intrastate business, for the privilege of pur-

suing the same business, solely by reason of the fact that the first *named railway company does a larger business both interstate and* foreign, and is therefore, a denial of the equal protection of the law.

X.

The Supreme Court of the State of Texas erred, in failing and refusing to hold that, because the evidence herein shows that the Texas & Pacific Railway Company is now, and was during the period involved in this suit, a railway corporation engaged in the transportation of commerce, both interstate and foreign, and intrastate, within the State of Texas, and belonging to the same class, and being in active competition with plaintiffs in error, and the other railway companies in the State, and the proof further showing that the said The Texas & Pacific Railway Company was chartered under and by virtue of the laws of the United States, and the Supreme Court of Texas, having held herein that the tax involved in this suit and levied by said Act of April 17th, 1905, was an occupation tax for the privilege of pursuing a business within the State of Texas, such occupation tax cannot be applicable to said The Texas & Pacific Railway Company, the same being a Federal corporation, and being therefore, as such Federal corporation, exempt from such tax, the application thereof to plaintiffs in error, being in the same class and similarly situated, would be to deprive them, and each of them, of the equal protection of the law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

XI.

The Supreme Court of Texas erred in its judgment herein, in holding that in estimating the amount of tax equal to one per cent

of the gross earning of plaintiffs in error, the earnings derived by plaintiffs in error from the government of the United States in the carriage of mails should be included, for the effect of such holding, is that the State may directly tax the carriage of United States mails, or compensation paid by the Government therefor, and is a tax upon an instrumentality of the Government of the United States, in violation of Subdivision 8, Section 8, Article 1, of the Constitution of the United States, empowering Congress to establish post offices and post roads, and is violative of Section 2 of Article VI of the Constitution of the United States providing that the Constitution of the United States and the laws made in pursuance thereof, is the supreme law of the land.

ARGUMENT.

The plaintiffs in error contend that the act of the Legislature approved April 17th, 1905, under which the tax sought to be recovered is imposed, levies a burden of taxation directly upon the receipts of plaintiffs in error from interstate and foreign commerce and that this is a direct burden upon such commerce and is such a regulation thereof as can be exercised only by Congress.

It is further contended that inasmuch as the properties of the plaintiffs in error are assessed and taxed at the regular *ad valorem* rate as the properties of the other tax payers in the state, and that they are further compelled to pay franchise taxes; that to compel them to render up to the State one per cent of their gross receipts from all sources, taxing thereby the income of property already taxed, is to deprive them of their property without due process of law and to deny them the equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States.

It is further contended that this tax is in reality an income tax and that no like income tax being levied upon other citizens and tax payers of the State of Texas, the constitution of said state requiring that taxation shall be equal and uniform, plaintiffs in error are denied the equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States.

It is further contended that this tax is levied exclusively upon steam railroad carriers, when other carriers shown by the testimony to be engaged in exactly the same character of business, as for instance, carriers by water and electric railroads, are exempted therefrom, and that thereby plaintiffs in error are denied the equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States.

It is further contended that the Texas & Pacific Railway Company, one of the largest railway systems of the West, [illegible], across its entire breadth, and with a total length of more than a thousand miles, with gross receipts of more than $12,000,000, is exempt from the burdens of this tax by reason of the fact that it is a Federal corporation and derives its franchises from Congress, and that this corporation being exempt, to levy a tax upon its competitors, to which it is not subject, is to deprive them of the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

It is further contended that plaintiffs in error having been chartered as common carriers of freight and passengers long prior to the passage of this law, and their property being assessed and equalized for taxation as other property in the State, and they and each of them paying their full *pro rata* of *ad valorem* taxation, and in addition thereto being compelled to pay franchise taxes and taxes upon their passenger receipts,—in addition to all this, to compel them to pay the extraordinary burden of one per cent. upon their gross receipts from all sources is to deprive them of their property without due process of law and deny them the protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

It is further contended that to levy a tax of one per cent. upon the plaintiffs in error upon the carriage of mails for the government of the United States, is to levy a tax directly upon an instrumentality of the Government of the United States, and in violation of that provision of the Constitution which empowers Congress to establish post-offices and post-roads.

The main questions, therefore, involved in the case at bar, are: (1) Whether this statute, copy whereof is attached to this brief and marked "Exhibit A", is in violation of that provision of the Federal

Constitution which vests in Congress the power to regulate inter-state error of their property without due process of law and denies them the equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States; and, (3) whether the tax imposed by the statute being levied upon receipts from United States mails is in violation of subdivision eight, Section 8, Article 1 of the Constitution of the United States, which empowers Congress to establish post-offices and post-roads; and of Section 2, article 6 of the Consitution of the United States, which provides that the Constitution of the United States, and laws made in pursuance thereof are the supreme laws of the land.

FIRST.

The Act of April 17th, 1905 levies a tax directly upon the receipts of plaintiffs in error from both interstate and foreign commerce:

The Court of Civil Appeals in its opinion (R. 174) says:

> "Viewing the act from every standpoint, we are of the opinion that it is a tax on the gross receipts of the railway companies and not an occupation tax; that the state has no power to impose a tax upon the interstate receipts is too well settled to admit of discussion. No state has the right or power to levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of subjects of that commerce or on the receipts derived from that transportation or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on commerce and amounts to a regulation of it which belongs solely to Congress."

Considering the phraseology of the act itself, the history of its passage through the legislature, comparing it with other taxation

statutes passed at the same term of the Legislature, and viewing it with reference to prior legislation and the decisions of the courts thereon, it is impossible to controvert the position of the Court of Civil Appeals of the Third Supreme Judicial District of Texas in this case, that this statute levies a tax directly upon the receipts of plaintiffs in error from interstate commerce. The Act in full will be found in the opinion of the Court of Civil Appeals (R. 157); in that of the Supreme Court (R. 240), and is attached to this brief and marked "Exhibit A." It is styled

> "An Act imposing a tax upon railroad corporations, the receivers thereof, and other persons firms or associations of persons owning, operating, managing or controlling any line of railroad in this state for the transportation of passengers freight and baggage, or either, equal to one per cent of their gross receipts, and providing for the collection and payment thereof, and repealing the existing tax on the gross passenger earnings of railroads."

The first section provides that every railroad corporation, or person operating the same shall pay to the state an annual tax for the year 1905 and for each calendar year thereafter, equal to one per cent of its gross receipts if such line of railroad lies wholly in the state, and if it lies partly within and partly without the state, it shall pay a tax equal to such proportion of one per cent of its gross receipts as the length of the portion of the line within the state bears to the whole length of the line, it being further provided that if satisfactory evidence should be submitted to the State Comptroller that any other proportion more fairly represents the proportion which the gross receipts of any such railroad for any year bears to its total gross receipts, it shall be his duty to levy and collect from such railroad a tax equal to such other proportion of one per cent of its total gross receipts.

For the purpose of determining the amount of the tax, it is

provided in section 2 that the proper officer of the company shall on or before the first day of October, 1905, and annually thereafter report to the Comptroller of Public Accounts under oath *the gross receipts of such line of railroad from every source whatever* for the year ending June 30th last preceding, and shall immediately pay to the State Treasurer the annual tax herein imposed, calculated on the gross receipts so reported. Sections 3 and 4 impose penalties, and section 5 requires the Attorney General to bring suit in the District Court of Travis County in case of failure to pay the tax. Sections 6 and 7 are as follows:

> "SECTION 6: The tax provided for by this act shall be in addition to all other taxes levied by law. Subdivision 36 of Article 5049, Revised Statutes of 1895, and any existing statutes imposing a tax upon the gross passenger earnings of railroads is hereby repealed."
>
> "SECTION 7: The tax imposed by this act shall not be levied upon or collected from any person, firm, association, corporation or receiver, owning, operating, managing or controlling any line of railroad in this state after such person, firm, association, corporation or receiver shall have paid the tax upon its intangible assets as provided for in an act of the Twenty-ninth Legislature, entitled: 'An Act for the Taxation of the intangible assets of certain corporations, and to provide for the creation of a State Tax Board for the valuation of such intangible assets and for the distribution of said valuation for local taxation, and for the assessment of said assets and the levy and collection of taxes thereon,' while the same may be in force and effect."

The reference in section 6 of the act here in controversy, to subdivision 36 of Article 5049 of the Revised Statutes of 1895, is a clerical error, subdivision 42 being intended. The error is cured, however, by the last clause of the section repealing any existing statutes imposing a tax upon the gross passenger earnings.

The subdivision of Article 5049, Revised Statutes of 1895, referred to is as follows:

> "From every person, firm, or association of persons owning or running any railroad cars or steamboat or stage coaches in this state, there shall be collected quarterly on the first day of January, April, July and October of each year a tax of one per cent. on steamboats and stage coaches and one per cent. on railroads upon *their gross receipts from all their passenger travel within this state.*"

It is seen that section 7 of the act in controversy provides that the tax shall not be levied on any railroad corporation after it has paid the tax upon its intangible assets as provided in the act upon this subject passed at the same legislature. This act is set out at length in "Exhibit B" attached to this brief. Section 12 of this intangible act provides that upon the taking effect thereof, and in compliance with its provisions and payment of the tax thereunder, that all laws and parts of laws *laying taxes upon the gross receiwts* of such individuals, corporations or associations, shall be and the same are hereby repealed.

It is a part of the general history of the State that the Twenty-ninth Legislature was concerned chiefly with matters of taxation. In addition to the bill herein discussed, it passed the intangible tax bill, being House Bill 22, appearing in this brief as "Exhibit B"; House Bill 361, which provides for the levy and collection of tax upon the gross receipts of various individuals and firms other than railroads, which is attached to this brief and marked "Exhibit C"; and the Franchise Tax Bill, being House Bill 53. These bills originated in the same body, the House of Representatives; dealt with the same subject matter; were all referred to the same committee, and were passed by the same Legislature. The act under discussion in section 7 above quoted, refers to the Intangible Bill which likewise in section 12 above referred to, makes reference to

this act. They are, therefore, parts of one general scheme of taxation, and are in legal contemplation practically one measure.

Construing these several acts together in the light of previous legislation and of the history of their passage through the Legislature, it is impossible to reach any other conclusion than that the act under discussion is a property tax levied, and intended to be levied, directly upon the gross receipts of railroads, both from interstate and intra-state commerce.

The one controlling and effective rule of construction is that the intention of the Legislature shall govern.

Weber vs. Rogan, 94 Texas 68.

Laws relating to the same subject and enacted during the same session of the Legislature are to be construed together and are ordinarily to be taken as a part of the same act.

Schendell vs. Rogan, 94 Texas 597.

This rule, of course, applies with great force where two acts mutually refer one to the other.

When an act is fairly susceptible of different constructions, it is proper for the courts to state the history of a bill in its progress through the legislature by examining the Legislative Journals.

Farmer Treasurer vs. Shaw, 93 Texas, 444.
State vs. Connor, 86 Texas 140.
Edger vs. Commissioners of Randolph County, 70 Ind. 338.

Few great constitutional questions have ever been decided by this court without reference to the debates of the Convention of 1797. A legislative construction placed upon an act is entitled to great weight, especially where that construction is contemporaneous A contemporaneous construction placed upon an act by co-ordinate

departments of the Government is entitled to weight. The Secretary of State in the session acts, styles the act as follows:

> "Railroads providing for the levy, assessment and collection of a tax on the gross receipts of."

In like manner, the companion bill, being House Bill 361, is styled "Taxes providing for levying and collecting taxes upon the gross receipts of certain individuals, firms and corporations."

Section 6 of the act under consideration above quoted repeals any existing statute imposing a tax upon the gross passenger earnings of railroads. Therefore with the exception of the bill under consideration, there is no law upon the statute books of Texas which can be held to impose such a tax.

Section 12 of the Intangible Assets Bill, above quoted, provides that upon the taking effect of that act and upon compliance with its provisions, all laws and parts of laws *laying taxes upon the gross receipts of such corporations* shall be and the same are herely repealed. When it is remembered that the only act then upon the statute books imposing a tax upon the gross receipts of railroads is the act here in controversy; that section 7 of that act refers directly to the Intangible Bill, and that the Intangible Bill in section 12, in turn, refers to the act under consideration as one imposing a tax upon the gross receipts of railways, it would seem that there ought to be no dispute upon the proposition that the Legislature intended to levy and did levy a tax directly upon the gross receipts of railroad corporations, as stated in section 2 thereof, from every source whatever. This construction gathers added force from the perusal of House Bill 361, for which see "Exhibit C" hereto attached, which is to the corporations therein enumerated what the act here involved is to railroad corporations. This act imposes an annual tax of three per cent. "on their gross receipts," upon telegraph

lines; of 1½ per cent. "on their gross receipts" upon telephones, and provides that "no gross receipt tax shall be levied upon any person, etc." controlling any telephone line not operated for hire. Each surety and guaranty company is required to pay a tax of two per cent. "on its gross receipts"; electric companies are required to pay a tax of one per cent "upon their gross receipts"; produce exchanges must pay a tax of 1-1/4 per cent "on their gross receipts"; wholesale dealers in oil pay an annual tax of two per cent "on their gross receipts"; text book companies are required to pay one per cent "on their gross receipts"; stock car companies are required to pay a tax of two per cent "on their gross receipts"; pipe line companies pay two per cent "on their gross receipts"; oil mills pay one per cent "on their gross products".

A further contemporaneous construction of the act is found in the Franchise Bill, page 21 of the Acts of the Twenty-ninth Legislature, in which occurs the following provision at the close of Article 5243*i*:

> "All * * * transportation companies * * * *now paying an annual income tax on their gross receipts in this state* shall be exempted from the franchise tax above imposed."

The act of April 6th, 1889, relating to railroads and steamboats imposed a tax of one per cent *upon their gross receipts from all their passenger travel within this state.*

The act of May 15th, 1897 required sleeping car companies, palace car companies, and dining car companies to pay a tax of 2-1/2 per cent of their gross receipts from all their passenger travel originating in and ending in this state.

The phraseology of the act itself, and of its caption, would seem to render it sufficiently clear that the tax imposed is one of one per cent upon the gross receipts of the railroad companies from

every source whatsoever,—that is to say, that railroad companies which are, under the undisputed and admitted facts in the case, paying already their full quota of taxation to the state, must, in addition thereto, yield up to the tax gatherers of the state one per cent of whatsoever sums they receive from interstate and foreign commerce, and this under the judgment in this case, they were compelled to do.

Construing the statute, however, with the Intangible Bill, the Franchise Tax Bill, the Gross Receipts Bill, as applied to corporations other than railway companies, and noting that in all this legislation the tax is described as one levied directly upon the gross receipts, it would seem to be a strained and unnatural construction, and one which is resorted to for the sole purpose of sustaining the act that it is not levied upon these receipts, but that such receipts are taken as a mere measure of the amount of an occupation tax. It will be shown hereafter that such a subterfuge cannot prevail because whatever may be the name of the tax, the law regarding not the form but the substance, will strike it down if the effect thereof is to lay a burden upon interstate commerce. A feeble attempt is made to make this act an occupation tax and to contend that no burden is thereby laid upon interstate commerce whatsoever, and that the sum charged is one which the corporation must pay for the exercise of its privileges within the state as a carrier of freight and passengers. This contention finds no reflection in the phraseology of the bill itself. It is nowhere declared on the face of the bill that it is an occupation tax. It is nowhere declared that the tax imposed is one for the privileges of exercising a franchise, but to the contrary, the tax is declared to be a tax upon the gross receipts in the bill itself. It is declared to be a tax upon the gross receipts in its companion bill, the Intangible Assets Bill. It is declared to be an annual income tax on gross receipts in the Franchise Tax Bill. In the act imposing income taxes on other corporations,

House Bill 361, similar taxes are declared in every paragraph to be taxes upon gross receipts. Similar taxes in effect at the time this act became a law, to-wit, that of April 6th, 1889, imposing a tax on passenger receipts, and the act of May 15th, 1897, imposing taxes on sleeping, palace and dining car companies, were declared to be taxes upon their gross receipts. But more than all this, the Legislature which passed the act, itself definitely and clearly declared that the tax imposed was not an occupation tax. And this declaration was made upon good cause.

It is a part of the general history of the state that there was at the time, a deficit in the state treasury. This condition is reflected in the emergency clause of the present act. General revenue was being sought for, from every source. As stated by the Court of Civil Appeals, R. 164 :

> " It is an historical fact that just about the time that the legislative declaration relied on was made that that body was creating tax schemes of nearly every character and reaching out after subjects upon which to impose them, and there was apparently from some sources exhibitions of distress, because the legislature had exhausted the subject and reached the limit."

The bill as originally introduced by its author on February 13th, 1905, for which see page 83 House Journal, was entitled :

> " An act imposing an occupation tax upon * * * any line of railroad, etc., equal to 1-1/2 per cent of their gross receipts within this state."

The Committee to which the bill was referred reported the bill favorably amending the caption so as to strike out the word " *occupation* " and also the words " *within this state.*" See page 379 House Journal. The bill as originally introduced constantly confined the receipts to intra-state receipts, but as amended by the Committee, the terms " occupation " and the terms " within this state " were omitted

wherever found. The Committee report being adopted by the House, this action taken in connection with the fact that it applies to all receipts without limitation as to character, and that the expression used is : " the gross receipts of such line of railroad from every source whatsoever " would seem to render it clear that the tax is not an occupation tax, and that the receipts intended are, as stated, receipts from every source whatsoever, pertaining to transportation including those from interstate and foreign commerce, as well as intra-state receipts.

The history of the companion bill, H. B. 361, is equally instructive as to the legislative intent. This bill as introduced by its author, page 269, House Journal, was entitled : " An act to provide for the levy and collection of a tax upon the gross receipts of certain corporations." The Committee sought to change the bill so as to make it levy an occupation upon the various persons and corporations enumerated, and in its report which was adopted by the House, (see House Journal pages 380-387), it was amended so as to entitle it : " An act to provide for the levy and collection of an occupation tax, etc." The bill in its passage through the senate was amended, and the House refusing to concur, a free conference committee was appointed (for which see page 1279 H. J.) and this committee submitted a new bill, from which the word "occupation" was stricken out wherever it occurred. The conference report was adopted. So solicitous was the legislature in regard to this matter, that not only does it strike out the word "occupation" wherever it occurs in either the act in controversy or in its companion act H. B. 361, but lest the construction herein contended for by the State of Texas might be placed upon the act, it specially provides in section 14 of the latter act that nothing therein contained shall authorize any county or city to levy an occupation tax on the business included

within its terms. The reason for this solicitude upon the part of the Legislature that the act should not be construed to be an occupation tax, is perfectly clear. The Legislature was facing a deficit in the general revenue. Every emergency clause in every tax bill discloses this situation.

Now, under the Constitution of the State, one-fourth of all occupation taxes goes to the benefit of the public free schools and it is the duty of the Board of Education to so distribute the same.

Section 3 of Article 7 of the Constitution of Texas is as follows:

> "SECTION 3: School Taxes: One-fourth of the revenue derived from the state occupation taxes, and a poll tax of one dollar on every male inhabitant of this state between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools," etc.

Section 8 of Article 7 of the Constitution constitutes the Governor, Comptroller and Secretary of State a Board of Education which distributes the funds, as provided by law.

It was the undoubted purpose of the Legislature in striking out the word "occupation" wherever it occurred in either of these bills, to make this tax a property tax, so that every cent thereof should go to cut down the deficit in the general revenue and that no part of the revenue derived from the tax should go into the public free school fund, which was in no need of additional taxes. Suppose, now, the Board of Education had declined to set aside one-fourth of the immense revenue gathered by this tax upon the moneys received by the carriers of Texas from their interstate and foreign commerce, to the public free school fund, and that the Attorney General had sought to mandamus the Board—to compel them to appropriate one-fourth of this sum to the public free school fund upon the ground that the tax was an occupation tax and that therefore this fund was entitled to its proportion thereof. Is it not perfectly

clear that the Board would have made defense, that there is nothing upon the face of the act to show that it is an occupation tax, that in prior legislation where such taxes were to be considered as occupation taxes they were so styled definitely, that in the present case the Legislature evinces, in every possible way that legislative intent can be disclosed, that it did not consider this tax an occupation tax, and that whenever and wherever it had the opportunity to do so, it declared the tax was not an occupation tax. Under such circumstances, could the Board of Education have been compelled to set apart one-fourth of this tax to the public free school fund ? The fact is, that it never occurred to any mind that this tax was an occupation tax until when brought face to face with the proposition that under it the State of Texas was undertaking to levy toll upon the interstate and foreign commerce of the country, some avenue of escape was sought and it was thought to be found in the strained and unnatural theory that this is an occupation tax. The opinion of the Supreme Court of the State of Texas does not answer or attempt to answer that of the Court of Civil Appeals upon this proposition.

It is equally clear that the tax is levied upon receipts from interstate commerce. In section 1, the tax is described as one : " equal to one per cent of its gross receipts ", and if the line is partly within the state and partly without, it is a tax equal to such proportion of one per cent of its gross receipts as the length of line within the state bears to its total length.

In order that there may be no mistake about the matter, and that the interstate and foreign receipts shall be unquestionably included, section 2 requires the corporation to report its gross receipts " from every source whatever " and that the tax of one per cent shall be calculated on the gross receipts thus reported.

It is instructive to remember at this point that the Revised

Statutes of 1879 of the State of Texas, Article 4665, undertook to levy a tax of one cent for every full rate telegraph message and one-half cent for every message less than a full rate message sent in the state. The Western Union Telegraph Company contested this tax as being a burden upon interstate commerce. The tax was sustained in 55 Texas 314. It was reversed by this court in 105 U. S. 464, the court holding that such a tax was a burden upon interstate commerce.

Therefore, when the state came to impose a tax of one per cent upon passenger traffic as it did by act of April 6th, 1889, it was careful to limit the gross receipts to *passenger travel within this state.*

The act of April 6th, 1889, for which see General Laws of Special Session Twentieth Legislature, pages 24–28, amends Article 4665 of the Revised Statutes so that the same shall read as follows :

> " ARTICLE 4665 : That there shall be levied on and collected from every person, firm, company or association of persons pursuing any of the following named occupations an annual occupation tax except when herein otherwise provided on every such occupation or separate establishment, as follows : * * * From every person, firm, or association of persons owning or running any railroad cars, steamboat, or stage coaches in this state, there shall be collected quarterly, on the first day of January, April, July, and October of each year, a tax of one per cent on steamboats and stage coaches and one per cent on railroads *upon their gross receipts from all their passenger travel within this state.*"

The Act of May 15th, 1897, for which see General Laws Twenty-fifth Legislature, page 170, contains the following provision :

> " Every sleeping car company, palace car company, dining car company, doing business in this State, and every corporation, person, or association of persons, leasing or renting, owning, controlling or managing any dining or sleeping cars within this State, for the use of the public, and for which

use any fare is charged, shall pay a tax of two and one-half per cent of their gross receipts, from all of their passenger travel *originating in and ending in this State*; this tax to be in addition to that now levied by law; but no occupation tax shall be levied on said companies by any county, city or town."

In view of the decision of this court in the telegraph case above cited, it was clear that it was the intention of the Legislature to limit the receipts taxed by these two acts to intra-state receipts. It is likewise clear that it was the intention of the author of the act in controversy to limit the receipts tax to the intra-state receipts. Both the caption of the bill as originally introduced and the body of the bill confines the gross receipts taxed to "their gross receipts within this state." The bill as introduced constantly confines these receipts therefore to the intra-state receipts. The Committee, however, amended the bill by striking out the term "within this state" wherever the same was found and in lieu thereof has inserted the phrase "gross receipts from every source whatever."

When we come to consider the provisions of H. B. 361, the companion bill which taxes the gross receipts of other corporations, we find that in every instance the receipts taxed are carefully limited to receipts within the state. Thus, in section 1 the tax laid upon the express companies is limited to "gross receipts from charges *within this state* paid to or collected by such company on account of money, goods, merchandise or other character of freight carried *within this state.*" Section 2 applicable to sleeping car, palace car, and dining car companies provides that such companies shall pay an annual tax equal to four per cent of their gross receipts earned from any and all sources *within this state.* In like manner telegraph companies and individuals owning them as set out in section 3, are required to pay an annual tax "from all

sources *within this state.*" The same phraseology is used in section 4 with reference to telephones. Private car lines are required in section 11 to pay a tax of two per cent on their gross receipts from all sources *within this state.* That the use of the phrase " within this state " is significant is shown by the fact that in this act it never occurs except when used with reference to those businesses which have both state and inter-state receipts, and it is never used where the business is purely domestic.

It is, therefore, apparent (1) that the tax is levied directly upon the gross receipts; (2) that the receipts includes receipts from interstate and foreign commerce; (3) that the tax imposed is not an occupation tax, and was declared by the Legislature that passed it not to be an occupation tax. That the judgment rendered was based upon the interstate and foreign receipts is of course apparent from the opinion of the trial court, the Court of Civil Appeals and the Supreme Court, as well as the judgment rendered by the trial court and the Supreme Court.

SECOND.

The tax to be levied directly upon the receipts from interstate and foreign transportation is a regulation of interstate and foreign commerce, contrary to that provision of Section 8, Article 1, of the Federal Constitution, which provides that " Congress shall have power to regulate Commerce with foreign nations and among the several states and with the Indian Tribes."

The gross receipts of plaintiff in error, the Galveston, Harrisburg & San Antonia Railway Company, for the year ending June

30th, 1905, were $7,472,458.48. Of this sum $5,209,389.79 was received directly from interstate and foreign commerce. $684,324.42 of these receipts were not apportioned between the domestic and the interstate and foreign commerce. The total receipts of the Galveston, Houston & Northern Railway Company for the same period were $1,284,317.47, of which $946,057.49 was received from interstate and foreign traffic. $51,545.03 were unapportioned, and the remainder belonged to the domestic or interstate traffic.

The Gulf, Western Texas & Pacific Railway Company had for the period mentioned total receipts of $155,511.01, of which $31,-121.81 was interstate traffic. $26,246.88 was unapportioned, the remainder being domestic traffic.

The New York, Texas & Mexican Railway with total receipts of $509,458.17 had $181,021.80 interstate receipts, $47,181.21 unapportioned, and the remainder was receipts received from interstate traffic.

All of these roads constitute a great transcontinental route, extending from Galveston upon the Gulf shore through the city of Houston, where it connects with trunk lines reaching all portions of the United States. It extends through San Antonio to Eagle Pass and El Paso upon the Mexican border. To and fro upon this transcontinental route, the commerce of the United States flows from ocean to ocean. Approximately seventy-five per cent, of its receipts are from interstate and foreign commerce. When it is considered that it is far more costly to conduct local or intra-state transportation than through or inter-state traffic, it is easily perceived that the domestic or state business of the system composed of the lines now owned by the plaintiff in error, the Galveston, Harrisburg & San Antonio Railway Company, and formerly owned by its co-plaintiffs in error, is but an incident to its inter-state business. The evidence in this case shows that the total receipts of all of the

railways in Texas approximate eighty million dollars, of which, far more than one-half, or more than forty million dollars is received from inter-state and foreign transportation. These railway companies, it is admitted and shown by the evidence, are now, and were at the time this tax was levied, paying their full *pro rata* part of the *ad valorem* taxation, and in addition thereto were paying taxes upon their franchises. The proposition is now made that the State of Texas can compel these companies to yield up to it one per cent. per annum upon all amounts received from this inter-state and foreign traffic. If one per cent. can be collected, why not two per cent. or twenty per cent? If Texas may levy tribute upon this commerce which passes into and through her territory, why not Arizona, New Mexico, and California?

If power and jurisdiction exist it is conceded that the hand of the State cannot be stayed, and it is within the power of one or more states to absolutely throttle the inter-state transit of commodities by forcing the carrier to yield up such amount of its receipts as that after the payment of operating expenses naught will be left.

It cannot avail that the tax is arbitrarily declared an occupation tax. Constitutional limitations cannot be broken down or circumvented by the form in which a thing is done or attempted. The judiciary will look through the form to the substance and will invalidate any legislative act which in its substance is a breach of constitutional right.

To tax the occupation of an importer is to tax the import. *Brown vs. Maryland*, 12 Wheat. 419. To tax the income of United States Securities is to tax the securities themselves. *Western vs. Charleston*, 2 Pet. 449. To tax an income from an official position is to tax the office itself. *Dobbins vs. Erie County Commissioners*, 16 Pet. 435. To tax a bill of lading is to tax the thing transported

and the receipts therefrom. *Almy vs. California*, 24 How. 169. A tax upon interest is a tax upon the bond. *Railroad Co. vs. Jackson*, 7 Wall. 262. A tax upon the auctioneer is a tax upon the goods sold. *Cook vs. Pennsylvania*, 97 U. S. 566. To tax the income of personal property and the rental of lands is to tax the property from which the income is derived. *Pollock vs. Farmers Trust Co.*, 157 U. S. 429. To compel the carrier to give information relative to an interstate transit is to burden and regulate interstate commerce. *Central of Georgia Ry. Co. vs. Murphey*, 196 U. S. 194. In like manner, it has been fully established that to tax the receipts from interstate commerce is to regulate that commerce itself. While at an early stage of the decisions of this Court it was thought that the power of Congress to regulate commerce among the states was concurrent with that of the state, it has become universally accepted doctrine that the power of Congress to regulate commerce among the states is exclusive.

As stated by Mr. Justice McLean in the *Passenger Cases*, 7 How. 397,

> "A concurrent power in the states to regulate commerce is an anomaly not found in the Constitution. If such power exist, it may be exercised independently of the federal authority."

Since that decision was rendered, the federal Congress by successive acts has covered the whole field of commerce between the states. The Interstate Commerce Act with successive amendments has brought within the field of federal legislation the entire subject of interstate traffic. The federal authority has gone further, and absolutely controls the instrumentalities of inter-state commerce. It controls the vehicle in which that commerce is transported, and it is held that a car not equipped in the manner prescribed by the Federal statute is an instrumentality of in-

terstate commerce, even though at the particular time inquired about it may not be engaged in an interstate transit. *Southern Pacific Co. vs. Johnson*, 196 U. S. 1. Congress has assumed jurisdiction of the relations between master and servant as applied to the instrumentalities of inter-state commerce and has prescribed an extensive set of rules governing the relative rights of master and servant with reference to railways engaged in interstate traffic. It regulates the number of hours that railway operatives shall work. Under the statute of 1866 every railway has the right to connect with other railways at the borders of a state. The interstate commerce Act forces every carrier engaged in interstate traffic into partnership with all carriers participating in through shipments, and the initial carrier is made liable for the default of any succeeding carrier. This conveys but a faint idea of the comprehensive manner in which Congress has covered the entire field of interstate commerce. Can it be contended then that a state under the thin disguise of an occupation tax imposed upon a so-called occupation which the carrier under the constitution and laws of Texas, as held by the Court of Civil Appeals herein, is not permitted to renounce, can without limit appropriate the receipts of a carrier from interstate and foreign traffic? As said by the Court of Civil Appeals in this case (R. 172).

> "It would afford a very convenient means by which to evade the commerce clause of the constitution and bring within reach of the state subjects of taxation which hitherto had been under the protection of Congress if the states by mere system of verbiage could disguise the real effect and purpose of the law. If this could be permitted, the State would, when the law was questioned, doubtless claim that when we taxed the carriers a sum equal to one per cent. of all of the commerce brought into and carried out of the State, we had no thought of violating the law and exceeding our jurisdiction, for it was not the commerce we were undertak-

ing to tax but the railway companies, the carriers that transported it, in a sum equal to the value of that commerce. Interstate commerce is as far removed from the burden of State taxation as property or receipts arising from property beyond the jurisdiction of the state. If the Legislature would impose upon corporations and persons within the state a tax upon their property having a situs within another state, such tax would clearly be unauthorized. *Louisville Ferry Co. vs. Ky.* 188 U. S. 396, *Delaware R. R. Co. vs. Penn.*, 198 U. S. 353. *Fargo vs. Hart*, 193 U. S. 499. Yet the most sanguine advocate of the far-reaching power of the authority of the State would never for a moment seriously contend that an imposition upon such persons and corporations in the state of a tax in a sum equal to a per cent. of the value of the property without the state or equal to a per cent of the revenues arising from it which have never been brought within the state would be valid. Nothing lawful to such a scheme would be added by the use of the words 'a sum equal to a per cent.' and the use of these words does not in the law in question assume such a magnitude as to overshadow the legislative intent. And they cannot indirectly be given an effect to accomplish something which the law expressly prohibits. It is the substance of the law and not the shadow that the courts observe. The effect of the Act and the subject on which the burden is laid will determine its character. *Stockard vs. Morgan* 185 U. S. 27, *Pollock vs. Farmers Loan & Trust Co.* 157 U. S. 58 * * *." "Viewing the act from every standpoint, we are of the opinion that it is a tax on the gross receipts of the railway companies and not an occupation tax. That the state has no power to impose a tax upon the interstate receipts, is too well settled to admit of discussion. No state has the right or power to levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on commerce and amounts to a regulation of it, which belongs solely to Congress."

That the Court of Civil Appeals states the law of this case is

settled by a long line of authorities. The question was first definitely presented in the case of the State Freight Tax case, 15 Wall. 232. The Legislature of Pennsylvania on August 25, 1864, passed " An Act to Provide Additional Revenue for the use of the Commonwealth " which provided that the president, etc., of every railroad company, steamboat company, canal company, slack water navigation company, and all other companies doing business within that State, and upon whose works freight might be transported, should make returns to the Auditor General under oath or affirmation, stating fully and particularly the number of tons of freight carried through or upon the works of said company for the three months immediately preceding the days upon which the reports were required, and at the time of making such report to pay to the State Treasurer on each two thousand pounds of freight carried at the following rates :

On the products of mines, two cents ; on hewn timber, livestock, forest, vegetable and other agricultural products three cents, and on all other articles five cents.

The company offered to pay a tax on all freight transported between points wholly within the state, but declined to pay it upon interstate shipments. The law having been held constitutional by the Supreme Court of the state, the cases went up on writ of error to the Supreme Court of the United States. This court there said " It has been repeatedly held that the constitutionality of a state tax is to be determined not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid (p. 272). . . . Beyond all question the transportation of freight or of the subjects of commerce for the purpose of exchange or sale is a constituent of commerce itself (p. 275). Nor is it at all material that the taxes are levied upon all freight as well that which is wholly internal as that of interstate freight * * *. The State

may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including within its provisions subjects within the domain of the state (p. 276).

After propounding the inquiry, "Where does the substantial burden rest?" the Court said:

> "Then, why is not a tax upon freight transported from state to state a regulation of interstate transportation, and therefore a regulation of commerce among the states? Is it not prescribing a rule for the transporter by which he is to be controlled in bringing the subjects of commerce into the state and in taking them out? The present case is the best possible illustration. The Legislature of Pennsylvania has in effect declared that every ton of freight taken up within the State and carried out, or taken up in other states and brought within our limits shall pay a specified tax. The payment of that tax is a condition upon which is made dependent the transaction of this branch of commerce. And as there is no limit to the rate of taxation, she may impose, if she can tax at all, it is obvious that the condition may be made so onerous that interchange of commodities with other states would be rendered impossible. The same power that may impose a tax of two cents per ton upon freight carried out of the state, may impose one of five dollars. Such an imposition whether large or small is a restraint of the privilege or right to have the subjects fo commerce passed freely from one state to another without being obstructed by the intervention of State lines. It would hardly be maintained, we think, that had the state established a custom house on her borders wherever a railroad or canal comes through the state line and demanded at these houses a duty for allowing the merchandise to enter or to leave the state upon one of these railroads or canals, such an imposition would not have been a regulation of commerce with her sister states; yet it is difficult to see any substantial difference between the supposed case and the one we have in hand."

The tax was accordingly held invalid.

The reasoning of the court in this case applies with accuracy to that at bar. Here we have a great instrumentality of commerce, transacting an interstate business of $5,209,389.00 as compared with an intra-state business of $1,578,755.00; and the State of Texas says to this corporation, out of every one hundred dollars of these five millions, you must take out one dollar for the privilege of transacting a business of one million dollars within the confines of the state, to which it is now paying its full quota of *ad valorem* tax, and from which it would not be permitted under the Constitution and laws to withdraw if it so desired. If the State of Texas can withdraw one dollar from every one hundred dollars of interstate commerce, why not five, or twenty, or more?

In *Telegraph Co. vs. Texas*, 105 U. S. 460, a tax of one cent on every full-rate message and one-half cent on every message less than full rate was held to be invalid. The Supreme Court of Texas, 55 Tex. 314, sought to sustain this Act by the contention much more plausible in that than in the case at bar, that it was an occupation tax, but this Court said at p. 466:

> "Clearly if a fixed tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried a tax on the passenger, or for the sale of goods a tax on the goods, this must be a tax on the messages. As such so far as it operates on private messages sent out of the state, it is a regulation of foreign and interstate commerce, and beyond the power of the state."

The *State Freight Tax Case* was again quoted in *Pickard vs. Pullman Co.*, 117 U. S. 34, where, after reviewing all of the authorities, this Court held that the law of Tennessee which imposed a privilege tax of fifty dollars per annum on every sleeping car used or run on a rail-

road in Tennessee, was void in so far as it applied to interstate transportation. There can be no logical distinction between a tax on each ton of freight or upon each passenger or upon each message and a tax on the amount received from the transportation of each ton of freight, or from the transportation of each passenger. A tax of five cents on each ton and a tax upon freight money paid for the transportation of the ton which calls for five cents is one and the same thing, and it is idle to say that such a tax is valid when called an occupation tax and invalid when it is not named.

The Act of the Legislature here in controversy requires that out of every one hundred dollars received from interstate and foreign transportation, one dollar shall be paid over to the State of Texas. If it has the power and jurisdiction to say that this one dollar shall be thus paid, there is no reason why five dollars, or any other amount may not be charged so that it is wholly within the power of the State to make interstate transportation wholly unprofitable and thereby destroy it. The case of *Fargo vs. Michigan*, 121 U. S. 230, involved a tax imposed upon the gross receipts of railways by the State of Michigan. The act was defended upon the customary grounds that it was a license or occupation tax. The Court however, in holding the law unconstitutional says at p. 243:

> "The proposition that the states can by way of a tax upon business transacted within their limits or upon the franchises of corporations which they have chartered, regulate such business or the affairs of such corporations has often been set up as a defense to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself and is commerce among the states or with foreign nations, the constitutional provision cannot thereby be evaded, nor can the states by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, which is itself interstate commerce, acquire the right to

regulate that commerce either by taxation or in any other way."

The leading case, however, upon this proposition is that of the Philadelphia Steamship Company vs. Pennsylvania, 122 U. S. 326. An act of the Legislature of Pennsylvania provided that every railroad incorporated under the laws of Pennsylvania and doing business in that state, and every express company, palace car company and sleeping car company incorporated under the laws of Pennsylvania and doing business in that state should pay to the State Treasurer a tax of eight-tenths of one per cent. upon the gross receipts of such company for tolls, transportation, telegraph business, or express business. The Supreme Court of Pennsylvania having held the Act constitutional, the question was reviewed by the Supreme Court of the United States. This Court, speaking through Mr. Justice BRADLEY said, at page 335 :

> " The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different States, and between the States and foreign countries, and from the charter of its vessels which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that and nothing else. In view of the decisions of this Court, it cannot be pretended that the State could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the State without interfering with the power of Congress. * * *
>
> " If then the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the State, could the fares and freight received for transporta-

tion in carrying on that commerce be constitutionally taxed? If the State cannot tax the transportation, may it nevertheless tax the fares and freights received therefor? Where is the difference?

"Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the State officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning.

"This Court did not so reason in the case of *Brown vs. Maryland*, 12 Wheat. 419. * * *

"The application of this reasoning to the case in hand is obvious. Of what use would it be to the ship-owner, in carrying on interstate and foreign commerce, to have the right of transporting persons and goods free from State interference, if he had not the equal right to charge for such transportation without such interference? The very object of his engaging in transportation is to receive pay for it. If the regulation of the transportation belongs to the power of Congress to regulate commerce, the regulation of fares and freights receivable for such transportation must equally belong to that power; and any burdens imposed by the State on such receipts must be in conflict with it. To apply the language of Chief Justice MARSHALL, fares and freights for transportation in carrying on interstate or foreign commerce are as much essential ingredients of that commerce as transportation itself. * * *

"The tax in the present case is laid upon the gross receipts for transportation as such. Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts, or the amount thereof (which is the same thing), for which the company is called upon to pay the tax. They are taxed not only because they are money or its value, but because they were received for transportation. No doubt, a ship-owner like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce or banking, or any other

employment. But this is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is enacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it."

The tax was accordingly held invalid.

It is not possible to distinguish this case from that at bar. In phraseology they are almost identical. The tax is laid upon the gross receipts from transportation as such. These receipts from transportation are followed and caused to be accounted for, dollar for dollar. It is these specific receipts, or the amount thereof, which, as the Court says, is the same thing for which the company is called upon to pay the tax. They are taxed not only because they are money or its value, but because they are received for transportation. The cases cannot be distinguished. The tax is levied, directly upon transportation as such, upon interstate transportation which is commerce. It is, therefore, invalid as in contravention of the Interstate Commerce clause of the Federal Constitution.

In *W. U. Tel. Co. vs. Pennsylvania*, 128 U. S. 39, the same law of Pennsylvania was held invalid as applied to the gross receipts of telegraph companies in that state.

Ratterman vs. W. U. Tel. Co., 127 U. S. 411, overthrew the validity of the Ohio law, levying a tax upon the gross receipts of telegraph companies. The question there submitted was, whether a single tax assessed under the Revised Statutes of Ohio, Art. 2778, upon the receipts of a telegraph company, which receipts were partly derived from interstate commerce and partly from com-

merce within the state, but which were returned and assessed in gross and without separation and apportionment, is wholly invalid or invalid in proportion to the extent that such receipts were derived from interstate commerce? The Court said at p. 424:

> "Neither are we of opinion that there is any real question under the decisions of this Court, in regard to holding that, so far as this tax was levied upon receipts properly appurtenant to interstate commerce, it was void, and that so far as it was only upon commerce wholly within the State it was valid."

Western U. Tel. Co. vs. Ala. 132 U. S., 472, overthrew a tax levied by the State of Alabama "on the gross amounts of the receipts by any and every telegraph company derived from the business done by it in this State at the rate of two dollars on the one hundred dollars", the Supreme Court of the State having held (see 80 Ala, 273) that the per cent should be calculated upon the gross receipts both state and interstate. In the State Supreme Court the act was defined as an occupation tax upon the authority of the *Texas case*, 55 Texas, 514; *State Tax on Railway Gross Receipts*, 15 Wallace, 284, and *Osborne vs. Mobile*, 16 Wallace, 479. It may be noted that this Court in all these cases looks through the form of the act to its actual effect, and although an act of the legislature of a State may be declared to be a privilege or occupation tax, yet, nevertheless, if it is in substance a tax upon interstate transportation, the Court has consistenly declined to sustain it. As re-affirmed by Chief Justice FULLER, in *Postal Tel. Co. vs. Adams*, 155 U. S., 698, the substance, and not the shadow, determines the validity of the exercise of power.

The Supreme Court of Kentucky in the cases of *Commonwealth vs. Smith &c.* 92 Ky., 38, in holding invalid a law imposing a license tax of five hundred dollars per annum on each one

hundred miles operated by express companies, and an annual sum of one thousand dollars where the distance is more than one hundred miles, and upon telegraph companies, of one dollar per mile for the line of poles and first wire, fifty cents per mile for each additional wire, said 43, 47 :

> " If the regulation of commerce belongs alone to the National Government, and of this there is no question, then it is apparent the State has no power to impose such burdens. Nor is it material that the burden imposed may not likely affect interstate business or commerce. It may not amount to a prohibition, still if the attempt or the effect of the legislation is to regulate interstate traffic the statute is invalid. * * *
>
> " In both of the cases under consideration, mere arbitrary sums are fixed without reference to value, and evidently, as is to some extent conceded, on the business of each, and whether under the guise of a specific or an *ad valorem* tax, it is manifest that the object and effect of each section of the statute is to impose burdens on the transportation or business of both corporations, and not upon the property within the State. The amount of the tax and the penalties annexed for enforcing payment, is, in effect, a prohibition of the exercise of the legitimate business of each of the appellees without first complying with the conditions of the statute. In view of the authorities cited, and the mode of enforcing this specific tax, it must be held that the two sections of the statute are in violation of sub-section 3 of Section 8, Article 1 of the Federal Constitution."

It is contended by the State of Texas that under the authority of the Gross Receipts Tax Cases, 15 Wallace, 284, a tax of the character here involved is justified. In so far as it may be construed to have decided that a tax on receipts from inter-state commerce was justified, it has been unquestionably overruled. The tax in that case was upheld on two grounds : First, that the receipts from interstate commerce had become commingled with the general

property of the State and was, therefore, taxable as such. Second, it was a tax upon the value of the franchise of the corporation. That these are the holdings of the Court is apparent. It says at p. 294 :

> (1). " The tax is not levied, and, indeed, such a tax cannot be, until the expiration of each half-year, and until the money received for freights and from other sources of income, has actually come into the company's hands. Then it has lost its distinctive character as freight earned, by having become incorporated into the general mass of the company's property." * * *
>
> (2). " There is another view of this case to which brief reference may be made. It is not to be questioned that the States may tax the franchises of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, or to the extent of its exercise; nor is it deniable that gross receipts may be a measure of approximate value, or, if not, at least of the extent of enjoyment. If the tax be, in fact, laid upon the companies, adopting such a measure imposes no greater burden upon any freight or business from which the receipts come than would an equal tax laid upon a direct valuation of the franchise. In both cases, the necessity of higher charges to meet the exaction is the same."

This case was decided a few days after the State Freight Tax case, and its authority at the time of its delivery was shaken by the strong dissent of Justices MILLER, FIELD, and HUNT. Its authority was questioned in Fargo vs. Michigan, where in the quotation already made from that opinion, the second ground is evidently disapproved of in so far as it applies to the right or franchise to do an interstate business. The whole case was re-examined in the *Philadelphia Steamship Company case*, 122 U. S., 326. After a full discussion of the opinion, Justice BRADLEY says (and it will be noted that the opinion of the Court is unanimous) :

> " A review of the question convinces us that the first ground on which the decision in State Tax on Railway

Gross Receipts was placed is not tenable; that it is not supported by anything in Brown vs. Maryland; but, on the contrary, that the reasoning in that case is decidedly against it.

"The second ground on which the decision referred to was based was, that the tax was upon the franchise of the corporation granted to it by the State. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act, it was laid equally on the corporations of other States doing business in Pennsylvania. If intended as a tax on the franchise of doing business—which in this case is the business of transportation in carrying on interstate and foreign commerce, it would clearly be unconstitutional. * * *

"But their business as carriers in foreign or interstate commerce cannot be taxed by the State, under the plea that they are exercising a franchise."

The Gross Receipts Tax case except in so far as it held to authorize a tax upon the value of a franchise, has been continuously treated as abandoned. It was so determined by the Supreme Court of Pennsylvania in the case of Delaware & Hudson Canal Co. vs. Penn., 1 L. R. A. 232. The trial Court whose conclusions of law were adopted by the Supreme Court discussed the question at length. It says:

"If we had any doubt upon the subject, we would be bound to give the Commonwealth the benefit thereof and uphold the tax in suit, leaving it to the Supreme Court of the United States to choose its own occasion of saying plainly how much authority its own decision should continue to have. But if that court has already spoken, and has plainly limited or destroyed the force of its earlier opinion, we are bound by this action also in the sphere of federal law, and cannot refuse to follow, even if some of our own decisions are still formally in the way. That this is in fact the present situation, and that the case in 15 Wallace has been in effect overruled, carrying with it, of course, the cases in which our

own court simply followed that decision, we are entirely satisfied, and we think a short review of the late authorities will make clear.

"The Railway Gross Receipts case was that of the Reading Railroad Company, a domestic corporation, and its receipts from all sources were held to be taxable by Pennsylvania for two reasons: first, because the receipts had passed into the general property of the Company, and had thus lost their distinctive character as freight earned for transportation; and, second because the tax was held to be upon the company's franchise, and to be only measured by the amount of its business as shown by its receipts. As the same court had just decided at the same term—*in the Freight Tax Case*, 82 U. S., 15 Wall., 232,—that a tax upon the freight or tonnage carried from one State into another was a regulation of of commerce, and could not be imposed by the State of Pennsylvania even upon a domestic corporation engaged in such carriage, it is not too much to say that the Gross Receipts decision was received with surprise. It was at once felt that the distinction thus drawn between freight and the money paid for carrying freight was unsound in principle and that the decision must soon be overruled. Even at the first, its force was much weakened by the strong dissent of three judges; but, of course, it bound all inferior courts, whatever their opinion of its reasoning might be, and it was followed here in the cases above cited.

"Since 1872, however, several cases on the subject of interstate commerce have been decided by the Supreme Court of the United States, in which the reasoning of the Court opposed both the conclusion and the logic of the earlier decision; and, finally, in Fargo vs. Michigan, 121 U. S. 230, the Railway Gross Receipts Case was taken up by name for consideration. This case was decided in April 1887, while the last case on this subject was decided by the Supreme Court of Pennsylvania in June, 1885. Mr. Justice MILLER easily and plainly distinguished the case in 15 Wallace from the case then before the Court, and would naturally have then dismissed it without further discussion if its authority had been still unquestioned; but he went on to say with much significance and with an evident reference to the facts of the earlier case:

(Here follows quotation already made above from the Fargo case).

"This was a sufficiently plain declaration that the second ground on which the tax was rested in 15 Wallace, viz: that it was a franchise tax—could not be maintained if the receipts sought to be taxed were derived from interstate commerce and were taxed as receipts from transportation.

"Fargo vs. Michigan was followed at the same term by Philadelphia & S. M. S. S. Co. vs. Pennsylvania, 122 U. S., 326, which was a case substantially identical in principle with the case of the Railway Gross Receipts. In each the defendant was a Pennsylvania corporation and in each the tax was imposed by Pennsylvania upon its gross receipts, including those derived from transportation between this state and points beyond its limits. * * * The Commonwealth naturally argued that the case in 15 Wallace was controlling, and that no rational distinction could be drawn between that decision and the case of the steamship company then before the Court; and, as we understand the opinion, which was delivered by Mr. Justice BRADLEY, no serious effort is made to draw such a distinction. On the contrary, he expressly declares on page 342 (1 Int. Com. R. 312) that 'a review of the question convinces us that the first ground on which the decision in State Tax on Railway Gross Receipts was placed is not tenable'; and, as the second and only other ground had already been declared not to be a good one in Fargo vs. Michigan, the decision itself would seem to be left with scanty support. But Mr. Justice BRADLEY goes on to speak also of this second ground; while he does not think that the tax imposed by the Act of 1877 was a franchise tax, he says with emphasis: 'It certainly could not have been intended as a tax on the corporate franchise, because by the terms of the Act, it was laid equally on the corporations of other States doing business in Pennsylvania. If intended as a tax on the franchise of doing business, which in this case is the business of transportation in carrying on interstate and foreign commerce, it would clearly be unconstitutional.' * * *

"If the case thus referred to, with others therein cited, and the language quoted, do not completely overthrow the authority of State Tax on Railway Gross Receipts, we are at

> a loss to understand their meaning. Believing that they do, we think it our duty to disregard that decision and to follow the later cases in holding that a statute which attempts to tax the gross receipts of transportation companies, derived, in the language of the act before us, from 'tolls and transportation, telegraph business, or express,' is not valid so far as such receipts are derived from commerce between points within and points without the State."

We have made this long extract from the opinion of the Pennsylvania Court for the reason that the statutes involved were Pennsylvania statutes, and the evident inclination of the Court as expressed, was to sustain them if possible. The Gross Receipts case has been universally admitted to have been overruled, and it is never quoted except upon the proposition that a State has the right to value the franchises of its own creation, and as so valued to tax the same, a proposition not now in dispute.

The Gross Receipts Act of Dakota was before the Supreme Court in *Northern Pacific R. Co. vs. Raymond*, 1 L. R. A., 732. The Attorney General admitted that the Gross Receipts Case above referred to had been overruled. He said :

> "In view of recent decisions of the Supreme Court of the United States, particularly *Fargo vs. Michigan*, 121 U. S. 230, and *Philadelphia Steamship Company vs. Pennsylvania*, 122 U. S., 326, it must be conceded that the tax or per centum upon so much of plaintiff's gross earnings as arose from transportation, not local within the territory, is a tax upon interstate commerce, and, therefore, unconstitutional and void.
>
> "At the date of the passage of the Act of March 9, 1883, (Laws 1883, Chap. 99), such a law in its entire scope, was recognized as valid by the Supreme Court of the United States. See *State Tax on Railways' Gross Receipts*, 82 U. S., 15 Wall., 284, which has been limited, if not entirely overruled by *Philadelphia Steamship Company vs. Pa.*, 122 U. 326."

The Court in delivering its opinion said :

> " It is clear at the outset, and conceded by the Attorney General for the appellant that so much of the Act ' An act to Provide for such Levy and Collection of Taxes upon the Property of Railroad Companies in this Territory " * * * as provides for a tax or the payment of a per centum in lieu thereof, upon the gross earnings of a railroad company operating in this territory, received for business—the transportation of passengers and property—not local—that is, not originating and ending wholly within this territory, but interstate, and therefore coming under the head of interstate commerce—is unconstitutional and void. It is an intermeddling with and an effort to tax the earnings or proceeds arising from interstate commerce, and the attempted usurpation of a power which, under the Coustitution, is to be solely and exclusively exercised by Congress. Among other cases, see *Fargo vs. Michigan*, 121 U. S., 230, 247 ; *Phila. & S. Steamship Co. vs. Pa.*, 122 U. S., 326, 347."

The case of *Vermont & Canada R. Co. vs. Vermont Central R. Co.* (Vt.) 10 L. R. A., 562 involved a Gross Receipts Tax and treated the *Gross Receipts Case* in 15 Wallace as overruled by the cases above referred to. An examination of all the cases shows that the Supreme Court of the United States considers the tax involved in the *Gross Receipts Case* in 15 Wallace to be a property tax and not an occupation tax. The *Fargo case* and the steamship case thus treat it.

In *Atlantic & Pacific Tel. Co. vs. Phila.*, 190 U. S., 160, Justice BREWER divided the various cases arising under the interstate and commerce class into five classifications ; and under the third, which is to the effect that while no state can compel payment for the privilege of engaging in interstate commerce, this immunity does not prevent a state from imposing the ordinary property taxes upon property having a situs within its territory and employed in interstate commerce. He cites State Tax on Railway Gross Receipts

here referred to. Of the same class is the *Maine vs. Grand Trunk Ry. Co.*, 142 U. S., 217, which was likewise essentially a property tax in lieu of all other taxes. While this case was decided by a divided court, that it is not in conflict with the Steamship case is apparent from the following excerpt from the opinion of Justice FIELD:

> "The case of *Philadelphia and Southern Steamship Co. vs. Penn.* 122 U. S., 326, in no way conflicts with this decision. That was the case of a tax, in terms, upon the gross receipts of a steamship company, incorporated under the laws of the State, derived from the transportation of persons and property between different States to and from foreign countries. Such tax was held, without any dissent, to be a regulation of interstate and foreign commerce, and, therefore, invalid. We do not question the correctness of that decision, nor do the views we hold in this case in any way qualify or impair it."

The opinion of the Supreme Court of Texas in this case does not attempt in any way whatsoever to dispose of the Steamship case nor to distinguish it from the case at bar. It treats that case as overruled by the *Maine vs. Grand Trunk Ry.*, 142 U. S., 217, notwithstanding the latter case distinctly reaffirms the principles announced in the former. The distinction between the Maine case and the case at bar is clear.

In the *Maine* case, the tax was like that considered in the *Postal Cable Co. vs. Adams*, 155 U. S. 688, and *McHenry vs. Alford*, 168 U. S. 651; that is to say, it was what this Court calls a commutation tax levied in lieu of all other taxes; and, therefore, in its essential nature a property tax, or a means resorted to by the State of ascertaining the entire value of the property situated in the State and not otherwise taxed. In the case at bar the State has already assessed and equalized for purposes of taxation the properties of plaintiffs in error, and at the time of the levy of this tax and for

long years prior thereto, they had paid taxes and were paying taxes to the State upon their full value thus ascertained.

It is contended that the Steamship case is not strictly applicable here for the reason that in that case all of the receipts were interstate and foreign, while here, part of the receipts are domestic. That this variance in the facts does not affect the principle or the result is manifest from the uniform line of cases in this Court, holding that a tax on interstate receipts cannot be sustained because the same tax is levied at the same time upon State receipts. (*State Freight Tax Case*, 15 Wallace, 232; *W. U. Tel. Co. vs. Texas*, 105 U. S., 460; *Pickard vs. Pullman Co.*, 117 U. S., 34; *W. U. Tel. Co. vs. Ala.*, 132 U. S. 477; *Allen vs. Pullman Co.*, 191 U. S., 171: *Le Loupe vs. Mobile*, 127 U. S., 648; *Caldwell vs. North Carolina*, 187 U. S., 622; *Brenan vs. Titusville*, 153 U. S., 32; *Asher vs. Texas*, 128 U. S., 132; *Robbins vs. Shelby Taxing District*, 120 U. S., 489; *Norfolk & Western Ry. Co. vs. Sims*, 191 U. S., 441; *Crutcher vs. Kentucky*, 141 U. S. 47; *Stockard vs. Morgan*, 185 U. S., 37.)

If it should be held, however, that the tax here involved is an occupation tax, there remain four propositions, three of which at least must be decided against the contention of plaintiffs in error before this tax can be sustained.

First—An occupation, license, or privilege tax cannot be laid on the occupation or business of engaging in interstate commerce, although at the same time such a tax be laid on the same party engaged in intra-state commerce.

Second—Assuming that the tax is imposed only on the intra-state occupation, the same is invalid, because:

(a). The State in levying a tax on a state occupation cannot base the same in whole or in part on the earnings of an interstate occupation, as the State cannot, in arriving at the amount of the

tax, for this would accomplish indirectly what the State may not do directly.

(b). The assessment of the tax at a sum equal to one (1%) per cent of the gross interstate earnings in effect is an impediment and serious obstruction to, and therefore a burden upon interstate commerce, as the carrier, in fixing his interstate rate, will necessarily consider that from the earnings of every pound carried, he must give to the State one (1%) per cent. If it be admitted that the State can so demand one (1%) per cent, it may demand any larger percentage, and under this form of taxation the State may without practical limit, regulate the interstate commerce even to the extent of suppressing the same.

Third—Though a tax be levied on the state occupation, where the burden of the same will necessarily fall on the interstate occupation and the party is not at liberty to decline the State occupation, such a tax cannot stand.

Fourth—The tax is laid on both the occupation of doing a state and interstate business. There is no room left for construction upon this proposition.

A reference to the purpose intended to be accomplished by the commerce clause of the Federal Constitution, as announced in the decisions of this court, may contribute to an understanding of the grounds occupied by plaintiffs in error.

In *Steamship Co. vs. Portwardens*, 6 Wall., 31, the Court said at p. 32:

> "The power to regulate commerce was given to Congress in comprehensive terms, and with the single exception of the power to lay duties on exports. And it was thus given, so far as it relates to commerce between the States, with the obvious intent to place that commerce beyond interruption or embarassment arising from conflicting or hostile State regulations."

FIELD said: "... Missouri, 91 U. S. 281, the Court, by Mr. Justice

> "The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection, and to no greater burdens. If, at any time before it has thus become incorporated into the mass of property of the State or nation, it can be subjected to any restrictions by State legislation, the object of investing the control in Congress may be entirely defeated. * * *
>
> "The power of the State to exact a license tax of any amount being admitted, no authority would remain in the United States or in this Court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating State legislation, favorable to the interests of one State and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow and the experience of the last fifteen years shows would follow, from the action of some of the States."

In *Steamship Company vs. Pennsylvania*, 122 U. S., 346, the Court said:

> "It is hardly within the scope of the present discussion to refer to the disastrous effects to which the power to tax interstate or foreign commerce may lead. If the power exists in the State at all it has no limit but the discretion of the State, and might be exercised in such a manner as to drive away that commerce, or to load it with an intolerable burden, seriously affecting the business and prosperity of other States interested in it; and if those States, by way of retaliation, or otherwise, should impose like restrictions, the utmost confusion would prevail in our commercial affairs. In view of such a state of things which actually existed under the Confederation, Chief Justice MARSHALL, in the case before referred to, said: 'Those who

> felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.' 12 Wheat. 446."

It is contended, however, by the defendant in error, that while the State has no power to directly tax the receipts from interstate and foreign transportation, yet it may levy an occupation tax on the business of the corporation within the State, and direct its assessor to arrive at the amount of such tax by taking from the Treasury of the corporation a sum equal to one per cent of the receipts of the corporation from interstate, foreign and domestic transportation. There is nothing in the Constitution of the United States which *e nomine* prohibits a state from taxing interstate commerce, and such taxation of interstate commerce has been and can only be held prohibited when the same in fact amounts to a regulation thereof by impeding, obstructing or placing a burden upon the same. As indicated by the opinions of this Court quoted from above, if a state can be permitted to tax interstate commerce, it can thereby just as effectually regulate such commerce, as though it had the direct power so to do. The question then, is not the name, but the effect of a tax.

If there is any principle to be extracted from the continued

enunciations of this Court upon this important subject, it is that

enunciations of this Court upon this important subject, it is that

the name given the tax by the State authority can have no logical weight in determining its validity. The sole question to be determined by the Court is, does the tax directly and immediately interfere with, burden or regulate interstate commerce?

Thus, in *People vs. Campagnie Gen. Transatlantique*, 107 U. S., 59, 63, it is said:

> "A State cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title."

And again, in *Stockard vs. Morgan*, 185 U. S. 27, 37.

> "Although it is said in the opinion of the State court herein that the thing taxed is the occupation of merchandise brokerage, and not the business of those employing the brokers, yet we have seen from the cases already cited that when the tax is applied to an individual within the State selling the goods of his principal who is a non-resident of the State, it is in effect a tax upon interstate commerce, and that fact is not in any wise altered by calling the tax one upon the occupation of the individual residing within the State while acting as the agent of a non-resident principal. The tax remains one upon interstate commerce, under whatever name it may be designated."

In *Robbins vs. Shelby Taxing District*, 120 U. S., 496; it was held that

> "The mere calling the business of a drummer a privilege cannot make it so."

It is held that a State cannot levy a tax of so much per person on interstate passengers (*Crandall vs. Nevada*, 6 Wall., 35; *People vs. Campagnie Gen. Transatlantique*, 107 U. S. 59; *Chy Lung vs.*

Freeman, 92 U. S. 275; *Passenger Cases*, 7 How. 283) of a tax so much per ton on in terstate freight *(State Freight Tax Case above cited)* or on the receipts derived from interstate transportation *(Fargo vs. Mich.*, 122 U. S., 230; *Steamship Company vs. Pennsylvania above cited)* because such taxation adds to the cost of interstate transportation and, therefore, amounts to an obstruction thereof, and if the power of the State be admitted to obstruct interstate commerce by taxain any degree, there is no limit to the extent to which the State may go.

An occupation tax, arrived at by a sum equal to one per cent. of the receipts from interstate commerce is, in effect, just as much an obstruction to such commerce as if a tax was directly levied by the State of one (1%) per cent on such receipts. From whatever source a carrier may obtain the money to pay the tax, it knows that upon every shipment of interstate freight it must yield to the state one dollar out of every one hundred, and that, therefore, the state has equal power to make the same ten, twenty or any other per cent.

Not only as above suggested does such a principle place it within the power of the State to so burden interstate commerce as that after the payment of operating expenses and such taxes nothing is left to the carrier by way of return upon its investment; but places it within the power of other States through which an interstate carrier may operate to absolutely prevent an interstate shipment by saddling it with successive per cents. No prudent individual would embark in business subject to such unlimited power upon the part of warring states.

A shipper of grain in the State of Nebraska, for instance, offers to a railroad company one hundred cars of grain for transportation to Galveston, Texas, for foreign export. The Nebraska railway company knows that the grain must pass over a Texas railroad, and applies to that road to join it in the through rate. The Texas rail-

road answers that the rate necessary to move this shipment is small, but out of its share of the same, it might make a margin of one per cent. profit, and it would therefore join the Nebraska company in the rate; but the State of Texas requires by the Act under consideration that this one per cent. must be given up to the State, so that nothing would be left to the Texas company, and it would therefore decline to handle the business. The Nebraska shipper is thus deprived of the competition of the Gulf route, and must ship on such terms as can be procured by the all-rail route to the Atlantic coast. The Federal Government at the instance of Senators and Representatives from Colorado, Nebraska, California and other Western States, has expended millions of dollars in providing a harbor and deep water at Galveston, now the second port of export in the United States. To that harbor flows grain from the Northwest, cotton fo transport to New York and to Europe, lumber to all the ports of the world, copper from Arizona, silver from Mexico, fruits from California, and all of the merchandise of Japan and China, and upon all of this commerce, as well as that which flows from Europe and from the Eastern States through Galveston westward, the State of Texas levies her tribute of one dollar out of every one hundred. If this power can be exercised in the manner here sought, it is within the power of the Texas Legislature to close her ports, render worthless her inter-state railway connections, and force this great commerce through other routes.

Still, it is seriously contended, that if this tax be enforced, it will not be an obstruction to interstate commerce. It may be said that the amount thereof now is so small that it will not be sufficient to cause the Texas railroads to decline the business of the people of these other states; but, as has often been decided by this Court in questions of taxation of interstate commerce, the amount of the

particular tax suggested by the State is wholly unimportant, for if it be conceded that the State may tax at all, there is no limit to the State's discretion. The power to tax is the power to destroy. This is not the first instance in which it has been asserted that a state may ascertain the amount of an occupation tax by reference to interstate business, or to other subjects which the State may not tax directly.

In State Tonnage Tax Case, 12 Wall., 204, an Act of Alabama laid a tax on property generally at one half of one per cent, but upon steamboats at the rate of one dollar per ton of the registered tonnage thereof. The steamboats involved were owned by citizens of Alabama and were engaged exclusively in navigation between points in that State. The counsel for the State of Alabama contended that it was not a tonnage tax, but a tax on the vessels arrived at so much per ton, and that the State having authority to tax the vessels, it could be of no consequence what form the State might adopt in which to impose the tax or to ascertain the amount thereof. A unanimous Court condemned this tax and in answer to the State's contention, said, at p. 216 :

> "If the tax levied is a duty of tonnage, it is conceded that it is illegal, and it is difficult to see how the concession could be avoided, as the prohibition is express, but the attempt is made to show that the Legislature in enacting the law imposing the tax merely referred to the registered tonnage of the steamboats 'as a way or mode to determine and ascertain the tax to be assessed on the steamboats, and to furnish a rule or rate to govern the assessors in the performance of their duties.'
>
> "Suppose that could be admitted, it would not have much tendency to strengthen the argument for the defendant, as the suggestion concedes what is obvious from the schedule, that the taxes are levied without any regard to the value of the steamboats. But the proposition involved in the suggestion can not be admitted as, by the very terms of the Act, the tax

> is levied on the steamboats *wholly irrespective of the value of the vessels as property* and solely and exclusively on the basis of their cubical contents as ascertained by the rules of admeasurement and computation prescribed by the Act of Congress."

Now mark the language of the Alabama Act :

> " On all steamboats, etc., a tax at the rate of one dollar per ton of the registered tonnage thereof."

Suppose the Texas act read, " *a tax on the railroads or their occupation at the rate of one per cent. of their Gross Receipts.*" Would it mean anything different ? Is there any difference in the meaning of " *a sum or tax at the rate of one per cent. of*" and " *a sum or tax equal to one per cent. of*" ?

Here the tax is levied wholly without reference to the value or amount of the State business of appellants, but is rated on the entire receipts from both State, interstate and foreign carriage, and the tax is the same although the State business might be only ten per cent. and the interstate and foreign business ninety per cent.

In the case of Crandall vs Nevada, 6 Wall, 35, the same learned counsel who represented the State of Alabama in the Tonnage Case argued that the tax of one dollar per passenger which the carrier was required to collect and pay was not in reality a tax on the interstate passenger, but was a tax on the corporation, regulated or determined only by the number of passengers carried. We think it is pertinent to quote from his argument (p. 38) :

> " It is strictly a tax on his business, graduated by the amount of such business, as are license taxes, which often are made to vary *pro rata* with the amount of business done by the person taking the license. Suppose that the State, after examining the affairs of this particular stage company, had found that it carried a thousand passengers per year, and without any reference to what they had observed, laid a tax of a thousand dollars a year on all stage companies engaged in business like that of Crandall. Would that tax be unconstitutional ? "

This is exactly the argument made by counsel for the defendant in error and by the Supreme Court of the State of Texas in order to sustain the present law. This Court, however, held that the Act was not susceptible of this construction, and said :

> " If the Act were much more skillfully drawn to sustain this hypothesis than it is, we should be very reluctant to admit that any form of words, which had the effect to compel every person traveling through the country by the common and usual modes of public conveyance to pay a specific sum to the State, was not a tax upon the right thus exercised. The Statute before us is not, however, embarrassed by any nice difficulties of this character."

The Nebraska or Kansas shipper who forwards his grain to Galveston, is as much required to pay the one per cent as if it were levied directly on the earnings instead of fixed as a sum equal to one per cent.

In *Robbins vs Shelby County Taxing District*, 120 U. S. 489, where it was held that a state could not levy an occupation tax on drummers who were making sales of goods shipped from other states, the Chief Justice, Mr. Justice FIELD and Mr. Justice GRAY dissented.

In *Corson vs Maryland*, 120 U. S. 502, decided on the same day, a majority of the Court, on the same grounds held that a tax of the state of Maryland was invalid, but in this case the Chief Justice and Justices FIELD and GRAY concurred, there being no dissent. The concurring opinion by the Chief Justice is as follows (at p. 506):

> " Mr. Justice FIELD, Mr. Justice GRAY and myself agree to this judgment, but on different grounds from those stated in the opinion of the Court. It is not denied that the statute of Maryland requires a non-resident merchant desiring to sell by sample in that State, to pay for a license to do that business a sum to be ascertained by the amount of his stock

> in trade in the state where he resides, and in which he has his principal place of business. This differs materially from the statute of Tennessee, which was considered in Robbins vs Taxing District of Shelby County, just decided, and is in its effect, as we think, a tax on commerce among the States. The charge for the privilege to the non-resident is measured by his capacity for doing business all over the United States, and without any reference to the amount done or to be done in Maryland."

In other words, that the State of Maryland could not tax an occupation pursued in other states under the guise of taxing an occupation followed in Maryland. To state the proposition differently, a state cannot in imposing an occupation tax which it has the right to levy, ascertain the amount thereof by reference to subjects which it has no right to tax. There it was said that the charge for the privilege is measured by the capacity for doing business all over the United States and without any reference to the business done or to be done in Maryland, and here the charge attempted to be made by the State for the privilege of doing business within the state, is measured by the capacity for doing both state, and interstate and foreign business, and without any reference to the amount of state business. For example: The International & Great Northern Railroad Company does practically twice the intra-state business and one-half the interstate business that is done by the Galveston, Harrisburg & San Antonio Railway Company, yet it pays less as an occupation tax for doing the intra-state business than does the Galveston, Harrisburg & San Antonio Railway, plaintiff in error herein. It is true, that where a railroad crosses the state line, that only the *pro rata* of the receipts of interstate and foreign business apportioned to the mileage of the road in Texas is taxed; but it is abundantly settled that the state has no more right to tax such *pro rata* than to tax the whole; and,

as the state may not tax such *pro rata* of the foreign and interstate receipts directly, within the principle of the concurring opinion in Corson vs. Maryland, it may not ascertain the amount of a state occupation tax by reference to such foreign and interstate receipts.

As stated by the Court of Civil Appeals herein (R 172): "Interstate commerce is as far removed from the burden of State taxation as property or receipts arising from property beyond the jurisdiction of the State."

In *Western Union Telegraph Company vs. State*, 55 Texas 314, the State levied an occupation tax on telegraph companies of one cent for every full rate message and one-half cent for every less than full rate message. When this case was decided by our Supreme Court, Osborne vs. Mobile, 16 Wall. 479, had not been overruled by LeLoupe vs. Mobile, 127 U. S. 648, and subsequent cases, and the decision in Steamship Company vs. Pennsylvania, 122 U. S. 326, which overruled at least the main features of the gross receipts, case, 15 Wall. 285, had not been made. The tax was upheld in the opinion of the court rendered by Judge GOULD, in the following language at p. 317:

> "The constitution of this State authorizes the Legislature to 'impose occupation taxes, both upon natural persons and upon corporations, other than municipal,' doing any business in this State'; and, although telegraph companies may be subject to congressional regulation, they are also subject to pay legitimate occupation taxes to the State, at least until Congress shall otherwise provide. The occupation tax in this case is proportioned to the number of messages sent, and seems to us designed to graduate the burden according to the amount of business done, and on principle to be free from objection as obstructing or regulating interstate commerce. Such an occupation tax, proportioned to the business done, regardless of any distinction between business done wholly within the State and business done in part without the State, conforms to the rule recognized by the Supreme

Court of the United States in attempting to mark out the boundaries of legitimate State taxation on the one side, and a regulation of interstate commerce on the other. Case of the State Freight Tax, 15 Wall. 232; State Tax on Ry. Gross Receipts, *id.* 285; Osborne vs. Mobile, 16 Wall 479. See also Western Union Tel. Co. vs. City of Richmond 26 Gratt., 1, Same vs. Mayer, 28 Ohio St., 523.

"In the Freight Tax case, the tax was regarded, not as a tax on the business or franchise, but as a tax on the thing carried, the burden falling on the consignor or consignee. Here the tax is on the occupation, not on the transportation of an article which is a subject of commerce; and, although it may, like a tax on gross receipts, increase the expense of telegraphic communication, the burden falls directly on the company, and the burden on the senders of messages is not affected otherwise than it would necessarily be by any species of taxation on the occupation or business of the country."

It will be noted that the tax was sustained in that case for the very same reason which is now advanced to support the tax in this case; that is, that the tax was on the occupation of the telegraph company and that the business done was only looked to to ascertain the amount of the tax. The opinion of the Supreme Court of Texas was reviewed in Telegraph Company vs. Texas, 105 U. S. 460, where the opinion was delivered by Chief Justice WAITE, who had written the concurring opinion in Corson vs. Maryland. The Court said at p. 465:

"The present case, as it seems to us, comes within this principle. The tax is the same on every message sent, and because it is sent, without regard to the distance carried or the price charged. It is in no respect proportioned according to the business done. If the message is sent the tax must be paid, and the amount determined solely by the class to which it belongs. If it is full rate, the tax is one cent, and if less than full rate, one-half cent. Clearly if a fixed tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on ton-

nage, or for every passenger carried a tax on the passenger, or for the sale of goods a tax on the goods, this must be a tax on the messages. As such, so far as it operates on private messages sent out of the State, it is a regulation of foreign and interstate commerce and beyond the power of the State. That is fully established by the cases already cited."

The following is from the argument of the Attorney General of Texas:

"The tax is not, however, laid on the message, but on the company for the number of messages sent. It is, by the very terms of the Act, payable quarterly, on the statement of the company, so that it was collected long after they were sent. It is, in effect, a tax upon the company's quarterly business."

Hence the reason upon which the Supreme Court of Texas based its ruling was clearly presented to the Federal Supreme Court. The following is also from the Attorney General's argument:

"If the tax had been a specific sum for carrying on the business of telegraphy, or on an assessment of the property of the company, or upon its gross receipts, no argument in keeping with the decisions of this Court could successfully assail its validity."

When the opinion of Chief Justice WAITE was delivered, the case of the Tax on Gross Receipts, 15 Wall., 232, had not been overruled by Steamship Company vs. Pennsylvania, 122 U. S., 326, and it was then the accepted doctrine that a State might levy a tax directly on the gross receipts of interstate transportation. This may account for the assertion of the Attorney General and the distinction intimated by the Chief Justice between an occupation tax ascertained with reference to the number of messages carried and one that might be ascertained in proportion to the business done, or the receipts. Now, that it is established that the State may not

directly tax the interstate receipts, we think that grounded on Telegraph Company vs. Texas holding distinctly that an occupation tax cannot be arrived at by a sum equal to one cent on every full rate and one-half cent on every less than full rate message, because such messages of themselves could not be taxed, it logically follows that an occupation tax ascertained at a sum equal to one per cent of the interstate receipts cannot be sustained, because such interstate receipts cannot be directly taxed.

Again, the Court in *Ratterman vs. Western Union Telegraph Company*, 127 U. S., 411, held that a tax on the receipts for messages sent within the State was valid, while invalid as to interstate messages. The latter tax might have been sustained in that case on the theory here urged by the appellees, if sound, that it was a tax on the corporation or its business or occupation in the State ascertained only with reference to the amount of the receipts, but such an idea did not seem to occur to the Court or to the counsel for the State of Ohio.

In the *Telegraph* case, 80 Ala. 273, the tax was vigorously assaulted as violative of the State Constitution and its validity under that Constitution was sustained by the Alabama court by holding that the tax was levied as an occupation tax. This opinion of the Alabama Supreme Court was before the Court in Western Union Telegraph Company vs. Alabama, 132 U. S. 472, where, notwithstanding the holding of the Alabama court that it was an occupation tax, it was held that so much of the statute as required the payment of the tax of a certain per cent on interstate messages was null under the commerce clause of the Federal Constitution.

It is true that in that case no provision was made by the statute for prorating the receipts for interstate messages on the mileage in Alabama as compared with the outside mileage, but, as heretofore

suggested, this could have made no difference in the principle of the decision, for it is abundantly established that the service performed within the State in transporting an interstate message or interstate freight is just as much interstate commerce as the service performed out of the State. *Rhodes vs. Iowa*, 170 U. S. 412; *Wabash Railway vs. Illinois*, 118 U. S., 570, *Hanley vs. Kansas City Southern Railway*, 187 U. S. 617; *Lehigh Valley Railway Co. vs. Pennsylvania*, 145 U. S., 192; the case of the *State Freight Tax*, 15 Wall., 232). And if the State may not ascertain the amount of an occupation tax by reference to the entire receipts, which it can not directly tax, upon the same ground it cannot ascertain the amount by reference to a portion of those receipts, which it cannot directly tax. This position is no wise in conflict with those cases (*A. R. T. Co. vs. Hall*, 174 U. S. 70; *Pullman Company vs. Pennsylvania*, 141 U. S. 18; *Adams Express Co. vs. Kentucky* 166 U. S. 171; *Adams Express Co. vs. Ohio (Sanford vs. Poe)*, 165 U. S. 194; *Mass. vs. Western Union Tel. Co.* 141 U. S. 40; *Western Union Tel. Co. vs. Gottlieb* 190 U. S. 412; *Pittsburgh Railway vs. Backus*, 154 U. S. 421; *Cleveland Railway Co. vs. Backus*, 154 U. S. 439; *W. U. Tel. Co. vs. Taggert*, 163 U. S. 1) which hold that where the line of a railroad company, express company or telegraph company extends into two or more States, that in assessing the property for taxation in anyone State the entire value of the property may be first ascertained and then the value of that part in the particular State determined by dividing the entire value on a mileage or a fair basis, for, it being admitted that the State may tax property though used as an instrumentality of interstate commerce, it follows that the State may resort to any appropriate means for ascertaining the taxable value thereof, and these decisions are on the theory that the line in Arkansas, being connected with the line in Texas, one adds value to the other. This is merely applying the same principle that exists in county taxation where the railroad is

wholly in one State. Each county certainly would not be required to assess the piece of road in it segregated from the balance at the county lines. In probably a number of cases, if the railroad was cut up at the county lines, the part in each county, except for junk, would not be acceptable as a free gift.

In Pickard vs. Pullman Southern Car Company, 117 U. S. 34, the State of Tennessee enacted a privilege tax of $50.00 per annum on every sleeping car used or run over a railroad in Tennessee, and this Act was held invalid in so far as it applied to cars engaged in interstate carriage. The court proceeded largely on the theory that a tax on the cars was, in effect, a tax on the passengers carried, citing Almy vs. California, 24 Howard, 169; *Crandall vs. Nevada*, 6 Wall., 35.

We insert the following:

> In *Railroad Co. vs. Maryland*, 21 Wall., 456, 472, Mr. Justice BRADLEY, in speaking for the court, said that a State cannot impose a tax or duty on the movements or operations of commerce between the States, because it would be a regulation of such commerce 'in a matter which is essential to the rights of all, and, therefore, requiring the exclusive legislation of Congress,' being '*a tax because of the transportation*,' and 'therefore, virtually, a tax on the transportation.'"

Certainly, requiring a Texas railroad to pay one per cent of its earnings on all freight originating in Colorado and carried to or through Texas, is a tax on the movements or operations of commerce and "a tax because of the transportation." If Almy vs. California, 24 Howard, 169, and Fairbank vs. United States, 181 U. S., 283, which hold that a tax on the bill of lading is, in effect, a tax on the freight carried, are of any force, it would seem that an exaction, by whatever name it may be called, of one per cent on the earnings

of all interstate freight is, in effect, a tax on that freight. We quote the concluding paragraph of the opinion in the case of *Pickard vs. Pullman Southern Car Company*, 117 U. S., 34, 51:

> "The question involved in this case was before the Court of Chancery of Tennessee in Pullman Southern Car Co. vs. Gaines, 3 Tenn. Ch., 587, on the same facts, as to the privilege tax for 1877. That Court held (and it is stated that the Supreme Court of Tennessee, on appeal, affirmed its ruling), that this privilege tax, as to such of the cars as passed and repassed through the State, and did not abide in it, was not amenable to the objection that it interfered with interstate commerce. The view taken was that the property of the foreign corporation, used in Tennessee, could be taxed as property or by an excise on its use; and that the tax in this case *was not directly on the object of commerce, or directly aimed at commerce.* We have given to the views set forth by the Tennessee Chancery Court the consideration due to the judgments of that tribunal, but are unable to concur in its conclusion."

In *Miller & Co. vs. Goodman*, 91 Texas 43, the Court by Justice BROWN, said:

> "The State, however, has no power to legislate upon the subject of interstate commerce *nor to place any restrictions upon it*, and in so far as the statute has such effect it is void. *Wrought Iron Range Company vs. Johnson*, 84 Ga. 754; *Ware vs. Hamilton-Brown Shoe Company*, 92 Ala. 145; *State v. Indiana & Ohio Oil, etc. Company*, 120 Ind. 575; *Gunn. vs. White Sew. Mach. Co.* (Ark) 20 S. W. Rep. 591; *Robbins vs. Shelby County Tax District*, 120 U. S. 489; *Leisy vs. Hardin*, 135 U. S. 100; *McCall vs. State of California*, 136 U. S. 104; *Cooper Mfg. Co. vs. Ferguson*, 113 U. S. 727; *Asher vs. State of Texas*, 128 U. S. 129; *LeLoupe vs. Mobile*, 127 U. S. 640."

Surely this exaction of one per cent must operate as such a restriction. It will prevent the Texas railroads from reaching out to great distances for interstate freight where, in order to obtain the same, their proportion of the rate must be small and the margin of profit low.

In *G. C. & S. F. Ry. Co. vs. Dwyer*, 75 Texas 579, the Court, by Justice GAINES, said:

> "That it [The State] can make no law which imposes either directly or indirectly a burden by way of taxation upon interstate commerce. *Pickard vs. Pullman*, 117 U. S. 1; *State Freight Tax case*, 15 Wall. 232; *Gloucester Ferry Co. vs. Pennsylvania*, 114 U. S. 196; *Walling vs. Michigan*, 116 U. S. 446; *Telegraph Co. vs. Texas*, 105 U. S. 460; *County of Mobile vs. Kimball*, 102 U. S. 691; *Robbins vs. Shelby Taxing District*, 120 U. S. 489; *Le Loupe vs. Mobile*, 127 U. S. 640; *Asher vs. Texas* 128 U. S. 129.

In *Harmon vs. Chicago*, 147 U. S. 396, Mr. Justice FIELD for the Court, referring to interstate commerce, said:

> "No state can interfere with it or put restrictions upon it without coming in conflict with the supreme authority of congress."

In *Wabash Ry. Co. vs. Illinois*, 118 U. S. 557, p. 575, the Court said:

> "Let us see precisely what is the degree of interference with transportation of property or persons from one State to another which this statute proposes. A citizen of New York has goods which he desires to have transported by the railroad companies from that city to the interior of the State of Illinois. A continuous line of rail over which a car loaded with these goods can be carried, and is carried habitually, connects the place of shipment with the place of delivery. He undertakes to make a contract with a person engaged in the carrying business at the end of this route from whence the goods are to start, and he is told by the carrier, 'I am free to make a fair and reasonable contract for this carriage to the line of the State of Illinois, but when the car which carries these goods is to cross the line of that State, pursuing at the same time this continuous track, I am met by a law of Illinois which forbids me to make a free contract concerning this transportation within that State, and subjects me to certain rules by which I am to be governed as to the charges which the same railroad com-

> pany in Illinois may make, or has made, with reference to other persons and other places of delivery.' So that, while that carrier might be willing to carry these goods from the city of New York to the city of Peoria at the rate of fifteen cents per hundred pounds, he is not permitted to do so because the Illinois railroad company has already charged at the rate of twenty-five cents per hundred pounds for carriage to Gilman, in Illinois, which is eighty-six miles shorter than the distance to Peoria."

Applying the substance of the language there used, the Texas carrier may say to the Kansas man, "I am free to make a fair and reasonable contract for this carriage to the line of the State of Texas, but when the car which carries these goods is to cross the line of that State, pursuing at the same time its continuous track, I am met by a law of the State of Texas which requires me to pay out of my treasury a sum equal to one per cent, or ten per cent, or twenty per cent, as the case may be, of the earnings in the State on a *pro rata* of the entire route, and the amount of the tax which I will have to pay consequent upon handling your shipment is so great that it will consume all the profit that I might otherwise make, and hence I cannot name a rate which will justify you in shipping your goods over my route as I do not care to haul freight merely for the purpose of hauling it without profit, so you must look for some other route to get your freight to salt water."

Substantially the same argument advanced in this case by the appellees was made by the Attorney General of Pennsylvania in the case of *State Freight Tax*, 15 Wall. 246, where he said:

> "The tax although familiarly called 'a tonnage tax' is in actual results *a tax on the corporation graded by the amount of business it transacts* in the province of transporter."

The railroad there in question was a Pennsylvania corporation.

If the State may not ascertain the amount of its occupation tax by a sum equal to two (2) cents on every ton of State and interstate

freight transported, on what principle may it ascertain the tax by a sum equal to one per cent (1%) of the earnings from such transportation? Except possibly as to the amount of the tax, where is the difference in the principle or in the effect?

The Indiana statute of 1881 levied a tax upon the earnings of the sleeping car business, in the proportion that the distance travelled through the State bears to the entire distance for which fares were received. *The state made exactly the same argument as that now urged by the appellees.* In holding this tax invalid, ELLIOTT, Justice, the eminent author, in State vs. Woodruff Car Co. 114 Ind. 155, declared at p. 159:

> "The Attorney General ably and ingeniously argues that the *statute is valid, because it is competent for the State to 'tax the local occupation of appellant by the measure of its gross receipts for the proportionate amount of travel in this State';* but this argument, while not without plausibility, is radically unsound. Under the law as authoritatively declared by the Court of last resort, no tax in any form or for any purpose can be laid upon interstate commerce. The matter of interstate commerce is a national matter with which States can in no wise interfere. The jurisdiction of the Federal Government absolutely excludes the States from directly or indirectly hampering or taxing commerce between the States.
>
> "The claim of the State is also put upon the ground that the appellee can be compelled to pay a *tax upon its gross earnings for the privilege of doing a local business in Indiana.* This position is untenable. In no event can a corporation, engaged in the business of interstate commerce, be taxed for the privilege of doing business in this, or any other State. This principle early found a place in our jurisprudence. Much as the highest Court of the nation has wavered upon kindred questions, from this principle it has never departed. Indeed, one of the great causes which led to the adoption of our Federal Constitution was the evil produced by the levying of tribute, in the form of taxes, upon the commerce between the States by some of the States under the Articles of Confederation. It is evident that

> to permit each State to levy taxes upon the earnings of common carriers whose lines of railroad traverse its territory would lead to deplorable results, for, once the power is conceded, then the method of its exercise, the amount of the tax, and like matters, would be within the exclusive control of the Legislature of each State, as neither the Federal nor the State Courts could supervise or control their discretion."

Southern Ry Co. vs. City of Asheville, 69 Fed. Rep. 361, involved in the North Carolina Act of March 13, 1895, which authorized the City of Asheville to levy on every railroad company doing business or having an office in the city, a license tax not to exceed one per cent of the gross receipts of its business. The city of Asheville in levying this tax considered only the intra-state business, but the Court said that this could not avail :

> "It is true that, in estimating its license tax, the city council only took into consideration the intra-state business of the company. But under the terms of the act they could have made the estimate upon the whole business of the company, and we deal not with what the council did do, but with what they could have done, under the authority conferred on them. The validity of this authority, not of their action under it, is the question before us."

In *L. & N. Railroad Co. vs. Eubank*, 184 U. S. 27, it was held that the Constitution of Kentucky prohibiting a railroad company from charging more for a longer than a shorter haul as applied to interstate commerce was invalid. The Court said at p. 34 :

> "It would seem that the foundation upon which the validity of the constitutional provision is based is the theory that it operates solely upon the rate within the State, making that rate unlawful if it exceed the rate for the longer distance over the same line in the same direction, though, as in this case, the longer distance is from Nashville, Tennessee, to Louisville, Kentucky. * * * The conten-

tion is that the State does not prescribe or regulate the rates outside of its borders; that the company may announce and enforce any rate it pleases regarding interstate commerce. It simply directs that between points within the State of Kentucky the charge shall not be greater for a shorter haul than for a longer haul, even though such longer haul may be between a point outside and one inside of the State; that this does not constitute an interference with, or a regulation by, the State of interstate commerce, and hence the provision is valid.

"If this contention were correct, and the constitutional provision as construed by the State Court did not by its enforcement regulate or *immediately and directly influence* and affect the interstate commerce of defendant, either as to amount or rates, the provision in question would be valid. But is it correct? And is there no such immediate influence upon or regulation of the interstate commerce of the defendant?"

After quoting at length from *Wabash Railway Co. vs. Illinois*, 118 U. S. 557, the Court again said at p. 40:

"Is not this reasoning applicable here? The Nashville owner of tobacco wishes to have it transported to Louisville, and asks the defendant to carry it. It responds that it would like to carry it at the rate of 12 cents per 100 pounds, but that it cannot do so because it has established a reasonable rate between points both of which are in Kentucky, and which rates are more than 12 cents, and that if it were to carry at the rate of 12 cents from Nashville to Louisville it would be necessary, on account of the law of Kentucky, to carry at the same rate all tobacco between all points in that State, which would entail a loss in the business between those points which the company would not be justified in sustaining; therefore, the transportation is declined, for it cannot get more than 12 cents from the Nashville man. Is it an answer to this statement to say that the company can get this business by lowering its rates within the State to the same rate as charged from Nashville? Is it bound, in order to secure this interstate commerce, to lower its rates all through the State. If it be, is not the law which accom-

> plishes this result a direct interference by the State with interstate commerce? And if it do not lower its State rates, and in consequence must raise its interstate rates in order to make its State rates valid, and thus must lose to an appreciable and important extent the interstate commerce, is not a law from which such necessary and direct consequences result a regulation in effect by the State, of that commerce which ought to be free therefrom?"

It involves a repetition to suggest that the language quoted from the *Eubank case*, with a slight change, is strictly applicable here. A shipper in Denver states to the railroad company that he can afford to pay 12 cents per hundred pounds for transportation of a certain product to Galveston, Texas, but the railroad answers, "when the shipment reaches the line of Texas I must give up one per cent, five per cent, or ten per cent, on the earnings on a mileage pro rate in that State, and with this exaction taken out of the rate proposed by you, there is no profit in the business and I cannot take it." There is a very large business done both ways between points in Texas and Chicago. If Texas may require the payment by the carrier of an amount equal to one per cent of its earnings in that State, Arkansas, Missouri and Illinois may do the same; or if the shipment move by another route, Illinois, Iowa, Missouri, Kansas, and the Indian Territory when it becomes a State, may do the same. A large traffic moves by rail between New York and San Francisco. If the State of New York may demand this exaction, then ten other States in the route may do likewise. That to sustain such a tax may eventually result in very serious burdens upon interstate commerce cannot be gravely questioned unless the announcement as made in the State Freight Tax and numerous other decisions of the Supreme Court of the United States, that a tax collected from the carrier on the freight carried or the earnings is a tax on the freight, because in fixing his rates the carrier must

necessarily estimate the tax as any other expense of doing the business, are overturned.

If, as broadly contended in the trial court, there is no limit to the occupation tax which may be imposed and the State may adopt any standard for ascertaining the amount, the State may, in effect, impose the entire burden on interstate commerce by rating a tax on a certain percentage of the earnings therefrom, excluding State Commerce. If it be urged that the carrier should so adjust its rates as, nevertheless, to place the burden on the State commerce, it is answered that this is not always easy to do. In Texas, in particular, the carrier would encounter an obstruction commonly known as the Railroad Commission. In a given state the rail carrier's rates might be made in competition with water carriers, so that the state rates could not be advanced to meet the burden placed on the interstate traffic. The Texas rates are to-day to a very large extent affected by water competition, and her people are attempting to extend the same by procuring from the Federal Government appropriations to improve the navigation of her rivers, and for intercoastal canals.

It being conceded that the State may tax the property engaged in interstate commerce, it may be thought that, in so far as the burden is concerned, such property tax will affect interstate commerce as much as a tax on the receipts thereof, or the occupation of engaging therein. As we believe under the Federal constitution (Postal Tel. Co. vs. Adams, *infra*), in any event under the constitutions of most of the states, certainly that of Texas, where the property of the carriers is taxed, it must be taxed on the same basis of valuation and at the same rate as other property, so that it is protected from undue or exorbitant impositions. Not so if the State be permitted to tax the receipts or the occupation. In some instances, as shown by this record, the interstate earnings are six

times as large as the State earnings. Assuming that the tax would fall equally on state and interstate commerce, the citizens of the State, by paying one dollar on state commerce will collect six dollars from interstate commerce. Say that a state shipper's taxes on his property now amount to $100.00 per annum and that one-half of this tax is removed from his property and laid on commerce, state and interstate, and that the volume of the commerce is equally divided, state and interstate, the state shipper by paying a tax of $25.00 on his state commerce, will reduce the tax on his property $50.00, $25.00 of which reduction will be contributed by his interstate neighbor, who will get no corresponding benefit by a reduction in his property taxes.

In *Central of Georgia Ry. vs. Murphey*, 196 U. S. 194, the statute of Georgia provided that, where any initial carrier limited its liability to its own line it should be the duty of such carrier on demand of the shipper to trace the freight over connecting lines and inform the shipper by which carrier the freight was lost, damaged or destroyed, etc. and upon failure so to do, the initial carrier was made liable for the amount of the loss or damage. By a unanimous court this statute was held to be an unwarranted regulation of interstate commerce in so far as the same applied to interstate shipments. We do not think that statute was such a serious interference with interstate commerce as the present statute, for freight is not so often lost or damaged in transit, while on every shipment, without exception, of interstate freight the statute makes an exaction of a sum equivalent to one per cent. of the earnings.

Defendants in error rely chiefly on the *Gross Receipts Tax* case, 18 Wall., 206, and *Maine vs. Grand Trunk Ry Co.*, 142 U. S. 217. Indeed, the opinion of the Supreme Court of Texas is based wholly upon the latter case. As heretofore observed, the *Philadelphia S. S. Co. vs. Pennsylvania*, 122 U. S. 326, is not discussed or

differentiated from the case at bar, but is treated as impliedly overruled by that case, notwithstanding the distinct declaration of the court that its authority was not questioned. So much of the gross receipts tax case as held that the tax therein involved could be sustained on the theory that it was a tax on the receipts of the company after they had become incorporated with the general mass of the property in the state is distinctly overruled by the *Steamship Co. vs. Pennsylvania* case, above cited. The other ground mentioned by the court as probably sustaining its ruling was that the state could tax the franchise of its corporations and the tax in question might be considered as a franchise or property tax. That branch of the case is not applicable here because the tax herein involved does not purport to be a franchise tax, the franchises of the incorporations subject thereto being taxable by other acts of the Legislature herein above referred to.

Maine vs. Grand Trunk Ry. Co., 142 U. S. 217, can be briefly stated, The Grand Trunk Railway, a Canada corporation, under legislative authority of the State of Maine, had leased a railroad located in Maine and constructed under a charter granted by that state, and as such lessee was doing business in the State of Maine. The leased line extended through other states to the Canada border where it connected with the road of the Grand Trunk. The Maine act levied an excise tax upon every railroad company operating in the state "for the privilege of exercising its franchise in that state," which tax with certain trivial exceptions not necessary to mention was in lieu of all other taxation, state, county and municipal.

It will be borne in mind that this tax is therefore what this Court has termed a commutation tax ; a tax in lieu of all other taxes, a tax which seeks to reach the essential value of the railroad as a business or going concern.

In the case at bar, the properties of plaintiffs in error including

their franchises are taxed *ad valorem* to the same extent as all other property in the state of Texas. Their franchises are specially taxed. (R., page 60.) The G., H. & S. A. Ry. Co. paying for the year beginning May 1st, 1905, the sum of $932 for its franchise tax ; the N. Y., T. & M. Ry. Co. for the same period $190 ; the G. W., T. & P. Ry. Co. $630 ; and G., H. & N. Ry. Co. $90. It will be further recalled that each of these companies had paid for the year ending June 30, 1905, a tax of one per cent. on its gross receipts from passenger travel within the State of Texas as follows : The G., H. & S. A. Ry. Co. $5656.52 ; the G., H. & N. $897.00 ; the G. W., T. & P. $487.22 ; N. Y., T. & M. $1011.06, which tax is likewise termed an occupation tax. The tax involved in this proceeding is expressly declared to be in addition to all such other taxation.

In the *Maine* case the amount of the tax was to be ascertained by a sum equal to one-quarter of one per cent. of the gross receipts when the average receipts did not exceed $2250 per mile, and the percentage of the tax gradually rose in proportion to the gross receipts until it reached 3¼ per cent., and where a railroad was operated across the state line, the earnings to be taxed under the law were to be ascertained on a mileage pro rate. By a majority of one, Mr. Justice FIELD rendering the opinion, the court sustained the tax. It said :

> " But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied ; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation."

Justices BRADLEY, HARLAN, LAMAR and BROWN dissented upon the ground that :

> " Whilst the purpose of the law professes to be a tax upon the foreign company for the privilege of exercising its franchise in the State of Maine, the mode of doing this is unconstitutional."

They rely on Pickard vs. Pullman Co., 117 U. S., 134 ; Norfolk & Western Ry. Co. vs. Pennsylvania, 136 U. S. 114 ; Crutcher vs. Kentucky, 141 U. S. 47. The case relied upon by the majority opinion as authority is Insurance Co. vs. New York, 134 U. S. 594, where the tax was sustained as a franchise or property tax. This is apparent from many expressions in said opinion, as for instance, the following :

> " In some States the franchises and privileges of a corporation are declared to be personal property. Such was the case in New York with reference to the privileges and franchises of savings banks."

Again, referring to the case of *Savings Bank vs. City of Rochester, N. Y.* 37 N. Y. 365, Mr. Justice FIELD said :

> " In its opinion the court observed that in declaring privileges and franchises of a bank to be personal property, the legislature adopted no novel principle of taxation ; that the powers and privileges which constitute the franchises of a corporation were in a just sense property."

Again, in delivering the opinion in *Horn Silver Mining Co. vs. New York*, 143 U. S. 305, 313, Mr. Justice FIELD said :

> " The right and privilege, or the franchise, as it may be termed, of being a corporation is of great value to its members and is considered as property separate and distinct from the property which the corporation itself may acquire. According to the law of most states this franchise or privilege of being a corporation is deemed personal property, and is subject to separate taxation."

privilege of exercising the franchise, but in view of the cases holding that a tax on the bill of lading is a tax on the freight; Almy vs. California, 24 Howard 169; Fairbank vs. United States, 181 U. S. 283, and that a tax on the income of real or personal property is a tax on the property, Income Tax Cases 157 U. S. 427, and of the reasoning in Home Insurunce Co. vs. New York above quoted upon which the Maine case relied, we think it must be accepted that a tax on the franchise is the same thing as a tax upon the privilege of exercising the franchise and that it was so treated by the court in the Maine case. The tax in the Home Insurance case was sustained upon the ground that the state in granting a charter forming a contract between it and the corporation, as a condition of the continued exercise of the charter might stipulate for the payment by the corporation in the way of taxation or otherwise of any sums of money to be determined in any way. As to what might be in the grant of a charter this is merely re-affirming Railroad Co. vs. Maryland, 21 Wall. 456, where it was decided that a state in granting a charter to a railroad company as one of the terms of the contract, could stipulate that a certain portion of the passengers receipts should be paid into the treasury of the state. In the Home Insurance case, Justice FIELD in stating that a state might exact a sum as a tax or otherwise as a condition of the continued exercise of the charter or franchise, was speaking with reference to a state which by its constitution or laws had reserved the power to amend, alter or repeal the charters of its corporations. This is apparent from the following statement in the opinion:

> "From the very nature of the tax, being laid upon a franchise given by the state and revokable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested. The power of the

state over the corporate franchise and the conditions upon case as in the other."

That this was the controlling idea of Justice FIELD in his opinions in both cases is evidenced by the following quotation from the opinion in the Maine case:

> "The privilege of exercising the franchises of a corporation within a state is generally one of value, and often of great value, and the subject of earnest contention. * * * As the granting of the privilege rests entirely in the discretion of the state, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the state in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury each year of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years."

It must be remembered that he was there speaking with reference to the Grand Trunk Railway Co. of Canada, which in the absence of authority granted by the United States, probably had no right to exercise the franchise of operating a railroad in the State of Maine without the consent of that state and upon this ground the state could annex any conditions it saw fit to its right of entering, and of exercising its franchises in the state. He did not pause to consider whether there was a distinction between the powers of a state to exclude a corporation of a foreign country from operating a railroad within the state of Maine without the consent of the Federal Government, and the authority of the State to exclude corporations of other states engaged in interstate commerce, but he assumed that the state of Maine had full power to exclude the Grand Trunk from its borders. That the state has no power to exclude corporations of other states who are engaged in interstate

commerce, was recognized in Horne Silver Mining Co. vs. New York, 143 U. S. 305, where Justice FIELD said:

York, 143 U. S. 305, where Justice FIELD said:

> "One of these qualifications is that the state cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in Pensacola Telegraph Co. vs. Western Union Telegraph Co., 96 U. S. 1, 12."

These reasons can have no application to plaintiffs in error. They are incorporated under special charters or under the general incorporation law of the state, long prior to the passage of this act, and the state has nowhere reserved the authority to appeal, alter or amend these charters. Therefore, any attempt by the state to impose subsequent onerous conditions in the form of taxation not otherwise admissible would be an impairment of the obligation of the charter contracts. However there is a broad distinction between taxing the franchise of a corporation as property, though it be engaged in interstate commerce, and taxing the occupation of engaging in interstate commerce or the receipts therefrom. The franchise may be derived from the state while the right to engage in the occupation of interstate commerce, if not obtained directly from the commerce clause of the Federal Constitution, is conferred by the act of Congress of June 15th, 1866, which is as follows:

> "Every railroad company in the United States whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, Government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor; and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination." (Compiled Statutes of the United States, 1901, Vol. 3, Sec. 5258).

If franchise and occupation be considered as equivalent, still the state could not tax a franchise derived from the Constitution of the

state could not tax a franchise derived from the Constitution of the

United States and confirmed by this Act of Congress. (*California vs. C. P. Ry. Co.* 127 U. S. 1).

That there is a difference between a franchise and an occupation runs through the current of judicial decisions in this court and elsewhere. (Beale on Foreign Corporations, Secs. 755 and 507). The occupation here is that of a common carrier by rail. The franchise conferred by the state is the right to associate in the form of a corporation for that purpose. The occupation might be pursued without such a franchise by an individual or a collection of individuals. If franchise and occupation are identical, then the franchise being already taxed by other laws, a second tax cannot be imposed by this act merely by changing the name of "franchise" to "occupation". Such double taxation is clearly forbidden by the Constitution of the State of Texas. It is contended, however, that the Maine case decides that in ascertaining the taxable value of a franchise, the state may look to the interstate and foreign receipts and that the same may be done in obtaining the amount of an occupation tax. Whether in ascertaining the value of property for taxation a state may look to the revenue or receipts earned by that property from whatever source, is an entirely different question from whether a state in taxing an occupation may not only look to receipts derived from that occupation, but also to the receipts and revenues derived from a distinct and independent occupation which the state has no right to tax. Could it be contended that the State of Texas could levy an occupation tax on lawyers and measure that tax by their receipts from property without the state? This would clearly not be due process of law. Why? Because the state has no jurisdiction beyond her borders. Interstate commerce is likewise beyond her jurisdic-

tion. It is a question of jurisdiction. It is a question of boundary It is a question of lack of power. The state has no more right to lay its hands upon interstate commerce than it has to extend its tax gathering arm beyond its boundaries.

From expressions by the individual members of this court, in prior as well as subsequent cases, and by their concurrence in opinions delivered by other Justices, it is manifest that the four members of the Court who concurred with Justice FIELD in the Maine case, did so upon the real ground that the Maine tax was a commutation tax in lieu of all other taxation, and no complaint was there made that the tax was of itself unreasonable or that it was of a greater amount than the Grand Trunk Railway could have been required to pay under the *ad valorem* or any other proper mode of taxation. It was not their intention to hold, and the opinion cannot be properly construed to hold that a state under the guise of an occupation tax could levy a tax on the gross receipts of a common carrier derived from interstate or foreign commerce, or take such receipts as a basis to levy a so-called tax on the business of such common carrier within the state. The concurring Justices in the Maine case were Chief Justice FULLER; Mr. Justice BREWER; Mr. Justice GRAY, and Mr. Justice BLATCHFORD.

In *Lyng vs. Michigan*, 135 U. S. 161, which shortly preceded the Maine case, Chief Justice FULLER said:

> "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. *LeLoupe vs. Mobile*, 127 U. S. 640, 648, and cases cited."

In the *Income Tax Cases* which shortly succeeded the Maine case, 157 U. S. 429, the Chief Justice said:

> "And so, although it is thoroughly settled that where by way of duties laid on the transportation of the subjects of interstate commerce, and on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce such taxation amounts to a regulation of such commerce and cannot be sustained, yet the property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or domestic commerce may be taxed, and when the tax is *substantially a mere tax on property and not one imposed on the privilege of doing interstate commerce*, the exaction may be sustained. 'The substance and not the shadow determines the validity of the exercise of the power.'"

In less than five months after the decision in the Maine case, Chief Justice FULLER in *Lehigh Valley R. Co. vs. Pennsylvania*, 145 U. S. 192, in rendering the opinion of the court said:

> "And while interstate commerce cannot be regulated by a state by the laying of taxes thereon *in any form*, yet whenever the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the distinction will be acted upon by the courts and the state permitted to collect that arising upon commerce solely within its own territory. Ratterman vs. Western Union Tel. Co., 127 U. S. 411, 424. * * * This Pennsylvania Company was not taxed in respect to its receipts from transportation from points in foreign states to other points in foreign states not touching Pennsylvania, nor from transportation by continuous carriage from points in a foreign State passing through Pennsylvania and ending into a third state; nor from transportation by continuous carriage from points in Pennsylvania to points in other states; nor from transportation by continuous carriage from points in other states to points in Pennsylvania; nor from transportation by continuous carriage from points in another state to other points in the same state passing through Penn-

> sylvania, but only in respect of receipts from transportation from points in Pennsylvania to other points in Pennsylvania without passing out of the State and from transportation by continuous carriage from points in Pennsylvania to other points therein, but passing out of Pennsylvania into another state and back again in the course of transportation."

In *Pacific Express Co. vs. Seibert*, 142 U. S. 349, decided within a month of the Maine case, Mr. Justice LAMAR who delivered the unanimous opinion, said :

> " It is well settled that a state cannot lay a tax upon interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs to Congress. Lyng vs. Michigan, 135 U. S. 161 ; LeLoup vs. Port of Mobile, 127 U. S. 640 ; Western Union Tel. Co. vs. Alabama, 132 U. S. 472 ; McCall vs. California, 136 U. S. 104 ; Norfolk & Western Railroad vs. Pennsylvania, 136 U. S. 114."

In *Postal Tel. Cable Co. vs. Adams*, 155 U. S. 688, the tax levied by the State under the name of a privilege tax on the telegraph company which was in lieu of all other taxation, was considerably less than would have been the *ad valorem* tax on the company's property. Mr. Chief Justice FULLER who delivered the opinion of the Court, said, at p. 695 :

> " It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and it cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for

the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment.

"As pointed out by Mr. Justice FIELD in Horn Silver Mining Company vs. New York, 143 U. S. 305, the right of a State to tax the franchise or privilege of being a corporation, as personal property, has been repeatedly recognized by this Court, and this whether the corporation be a domestic, or a foreign corporation doing business by its permission within the State. But a State cannot exclude from its limits a corporation engaged in interstate or foreign commerce, or a corporation in the employment of the general government, either directly in terms or indirectly by the imposition of inadmissible conditions. Nevertheless the State may subject it to such property taxation as only incidentally affects its occupation, as all business whether of individuals or corporations, is affected by common governmental burdens. Ashley vs. Ryan, 153 U. S. 436 and cases cited.

"Doubtless, no state could add to the taxation of property, according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution. (*Cleveland, Cincinnati, &c. Ry vs. Backus*, 154 U. S., 439–445).

* * * * * * *

"'A tax on privileges', has been determined by the Supreme Court of Mississippi to be in harmony with the Constitution of that State, and that, 'where the particular arrangement of taxation provided by legislative wisdom may be accounted for on the assumption of compounding or commuting for a just equivalent, according to the determination of the Legislature, in the general scheme of taxation, it will not be condemned by the Courts as violative of the [State] Constitution.' *Vicksburg Bank vs. Worrell*, 67 Miss. 47–58.

"And in the case at bar, the Supreme Court, in its examination of the liability of plaintiff in error for the taxes in question, said: 'It will be thus seen at once that this is a tax imposed upon a telegraph company, in lieu of all others, as a privilege tax, and its amount is graduated according to the amount and value of the property measured by miles. It is to be noticed that it is in lieu of all other taxes, state, county and municipal. The reasonableness of the imposition appears in the record, as shown by the second count of the declaration and its exhibits whereby the appellant seems to be burdened in this way with a tax much less than that which would be produced if its property had been subjected to a single *ad valorem* tax.' This exposition of the statute brings it within the rule where *ad valorem* taxes are compounded or commuted for a just equivalent, determined by reference to the amount and value of the property. Being thus brought within the rule, the tax becomes substantially a mere tax on property and not one imposed on the privilege of doing interstate business. The substance and not the shadow determines the validity of the exercise of the power. * * *

"We concur with the view of the Act thus expressed by the Supreme Court of the State, and, accepting it as correct, it is obvious that the case does not fall within the line of decisions in which State laws have been held inoperative because in conflict with, or amounting to the exercise of, or the assertion of control over, a power vested exclusively in the United States. In those decisions the interference with the commercial power was found to be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance. They need not be reexamined here, as the taxation in question according to the

proper interpretation of the statute, is in principle such as was sustained in *Western Union Tel. Co. vs. Massachusetts*, 125 U. S., 530; *Ratterman vs. West. Union Tel. Co.*, 127 U. S., 411; *Pullman's Palace Car. Co. vs. Pennsylvania* 141 U. S., 18; *Massachusetts vs. West. Union Tel. Co.*, 141 U. S. 40; *Maine vs. Grand Trunk Ry. Co.*, 142 U. S., 217.'

In the final paragraph of the opinion, it was said:

"We are of opinion that it was within the power of the State to levy a charge upon this company in the form of a franchise tax, *but arrived at with reference to the value of its property within the State and in lieu of all other taxes*, and that the exercise of that power by this statute, as expounded by the highest judicial tribunal of the State in the language we have quoted, did not amount to a regulation of interstate commerce or put an unconstitutional restraint thereon."

It will be observed that Chief Justic FULLER here makes a clear exposition of the grounds on which the Maine case was really decided and that is, that the tax there denominated a tax on the franchise or upon the privilege of exercising the same was in lieu of all other taxation or a commutation thereof, and was substantially a mere tax on property.

Observe the following language from the opinion:

"This exposition of the statute brings it within the rule where *ad valorem* taxes are compounded or commuted for a just equivalent determined by reference to the amount and value of the property, being thus brought within the rule, the tax becomes substantially a mere tax on property and not one imposed on the privilege of doing interstate business. The substance and not the shadow determines the validity of the exercise of the power."

This, therefore, is really the holding in the Maine case. The tax there imposed was a commutation tax where the *ad valorem* taxes had been compounded for a just equivalent determined by reference to the amount and value of the property, and thus considered, the

tax was substantially a mere tax on property and not one imposed upon the interstate commerce.

In *Cleveland, etc., Railway Co vs. Backus*, 154 U. S., 439, Mr. Justice BREWER, one of the majority in the Maine case, in delivering the opinion of the court, said :

> " All that has been decided is that, beyond the taxation of property according to the rule of ordinary property taxation, no state shall attempt to impose the added burden of a license or other tax for the privilege of using, constructing or operating any bridge or other instrumentality of interstate commerce, or for the carrying on of such commerce. It is enough for the state that it finds within its borders property which is of a certain value. What has caused that value is immaterial. It is protected by state laws and the rule of all property taxation is the rule of value, and by that rule property engaged in interstate commerce is controlled the same as property engaged in commerce within the state."

In the case of *A. & P. Tel. Co. vs. Pennsylvania*, 190 U. S. 160, Mr. Justice BREWER again said at p. 162 :

> " No state can compel a party, individual or corporation, to pay for the privilege of engaging in interstate commerce."

Again, in *Adams Express Co. vs. Ohio*, 166 U. S. 185, in delivering the opinion of the Court on petition for rehearing, he said :

> " Again and again has this court affirmed the proposition that no state can interfere with interstate commerce through the imposition of a tax *by whatever name called which is in effect a tax for the privilege of transacting such commerce*, and it has as often affirmed that such restriction upon the power of a state to interfere with interstate commerce does not in the least degree abridge the right of a state to tax at their full value all the instrumentalities used for such commerce."

That Mr. Justice BREWER voted to sustain the tax in the Maine case upon the ground that it was a property or commutation tax is

further apparent from the opinion of the court delivered by him in A. & P. Tel. Co. vs. Penn. wherein he said :

> " The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to State taxation, providing, at least, the franchise is not derived from the United States."

In referring to the *Maine case* in the opinion in *Michigan Central Ry. vs. Powers*, 201 U. S., 296, he said :

> " But this court reversing that judgment [that of the court below] held that the reference to the receipts [interstate] was simply to ascertain the value of the business done by the corporation."

The case of *McHenry vs. Alford*, 168 U. S. 651, relied upon by defendant in error, shows beyond all controversy that in order to sustain a tax, the amount of which is gauged by interstate receipts, this method must be resorted to as a mere means of ascertaining the value of the property or the business, and in lieu of and as a commutation or compounding for the regular *ad valorem* taxes. There was involved in that case an act of the Territory of Dakota, which was attacked as unconstitutional under the decisions in the Fargo and Steamship cases. The case was determined on a different ground.

The court by Mr. Justice PECKHAM, however, said at p. 670 :

> " But there is great force in the claim that the Act is not subject to the objections mentioned in the above cases reported in 121 and 122 U. S., and the cases therein referred to. In those cases there was a distinct tax upon the gross earnings without reference to any other tax, and not in substitution or in lieu of another tax, while in this case the act plainly substitutes a different method of taxation upon the property of a railroad company. It is a tax upon the lands and all the other property of the company, but instead of placing a valuation upon the lands and other property,

> and apportioning a certain amount upon such valuation directly, as was the old method, a new one is established of taking a percentage upon the gross earnings as a fair substitute for the former taxes upon all the lands and property of the company, and when it is said, as it is in this Act, that the Tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings."

It thus appears from their deliberate expressions in prior and subsequent cases that it never was the intention of the Justices who concurred in the decision in the Maine case to hold that a state could levy an occupation tax on a corporation engaged in the transportation of interstate commerce or could levy a so-called state occupation tax on such corporation and ascertain the amount thereof by a percentage on the gross receipts of the interstate and foreign commerce, but that in fact the tax was there sustained as a property or commutation tax in lieu of all other taxation.

In like manner the case of *Wisconsin & Mich. Ry. Co. vs. Powers*, 191 U. S., 379, involved a commutation tax in lieu of all other taxation, where the value of the property as property was ascertained by a reference to the amount of the gross receipts.

Prof. Beale of Harvard University, in his recent work on Foreign Corporations, with reference to the case of Grand Trunk Railway vs. Maine, said (Section 758) at page 925 :

> "This case has also been many times cited with approval. Some of the points apparently decided in it, however, can hardly be supported. The ground seemingly taken by the majority that the tax might be supported as an

> excise tax for the privilege of coming into the State, is certainly unsound; for later as well as earlier cases agree that a State cannot exclude from its territory a corporation or an individual engaged in interstate commerce or in the service of the national government."

In support of the above statement he cites *Bank vs. Earl*, 13 Pet. 519; *Pensacola Tel. Co. vs. Western U. Tel. Co.* 96 U. S. 112; *Postal Tel. Co. vs. Adams*, 155 U. S. 688; *A. & P. Tel. Co. vs. Penn*, 190 U. S. 160. It is so held in *Miller & Co. vs. Goodman*, 91 Tex., 41.

Prof. Beale then states in substance that the Maine case is really grounded on the reasons stated by the Court in Postal Telegraph Co. vs. Adams, 155 U. S. 688, from which quotation has already been made; Sec. 759; that is, that the tax was a commutation tax in lieu of all other taxation. After reviewing all of the principal authorities, Prof. Beale states his conclusion in Sec. 763, as follows:

> "It would seem, then, that a State tax upon a foreign corporation engaged in interstate commerce in order to be valid, must fulfill two requirements; first, it must be levied equally upon domestic and foreign corporations; second, it must in substance be a means of making property within the state bear its share of the burdens of government or of paying for the grant of special privileges or for special services not connected with interstate commerce. If the tax fails in either of these respects it is a tax on commerce, and is in alid.'"

While this was written with special reference to foreign corporations, there is no distinction in this respect between foreign and domestic corporations, for it has been repeatedly held by this court that the state cannot regulate or tax interstate commerce, whether the carrier which transports the same be a state or a foreign cor-

poration; to which effect see also *State vs. G. C. & S. F. Ry. Co.*, 44 S. W. 542; *State vs. Southern Kansas Ry.*, 49 S. W. 252; *G. C. & S. F. Ry. vs. Fort Grain Co.*, 72 S. W. 419; *Miller vs. Goodman*, 91 Texas 43.

Prof. Beale clearly interprets the Maine case as holding that the tax there imposed, being in lieu of all other taxation and in commutation thereof, was in reality a property tax, and that the reference to the receipts was merely a method resorted to to ascertain the value of the property. He says (Section 750):

> "A tax laid not on the property of a corporation doing interstate business but upon the doing of that business itself, is obviously a regulation of interstate commerce, and therefore unconstitutional. Thus a tax proportioned to the number of passengers transported, or freight carried, is clearly a tax on commerce and is bad; and so, is a tax on messages sent or received beyond the limits of the state. If the effect of the state statute is to impose such a tax, the exact form of it is immaterial."
>
> "A New York State statute provided that the master of every vessel entering New York should either pay a small fee or enter into a bond for each passenger brought into the state. This was held to be unconstitutional."

In Section 754, he says:

> "There is probably a difference in this respect [obtaining a license fee solely for intra-state business], between an ordinary commercial business and the business of a public service company which is directly engaged in interstate commerce.
>
> "The ordinary commercial corporation may be taxed for the privilege of doing business even though part of its business consists of the sale of goods brought from another state, provided part of its business is or may be the sale of domestic goods. But it seems that where an Express Company or a Railroad is engaged in interstate commerce, it is difficult, if not impossible, to impose conditions on its

business within the state which will not affect its interstate business. *(L. & N. Ry. vs. Eubank*, 184 U. S. 87.)

The Supreme Court of the United States has pointed out the distinction between corporations organized to carry on interstate commerce and having a quasi-public character, and corporations organized to conduct strictly private business. [New York vs. Roberts, 171 U. S. 658]; and this distinction has been emphasized in other cases."

Continuing, he says, in Section 755:

"But while permission to do the business of interstate commerce may not be taxed, the franchise of the corporation, *regarded as property*, may be taxed so far as it can be said to enter into the value of the property within the state, even if the corporation is engaged in interstate commerce, provided only it is not a franchise conferred by the United States. (Postal Tel. Co. vs. Adams, 155 U. S. 688.) The distinction between a tax upon the franchise and a license fee to do business is certainly a shadowy one, but once the principle already considered is established, that a foreign corporation may be taxed in a state as upon its property actually there, upon its business capital including franchise and good will, it follows that such a tax assessed upon the franchise of a foreign corporation engaged in interstate commerce *is valid as a mere tax on property within the jurisdiction.*"

After discussing at length the decision of this court in the Maine case, he says (Section 759):

"In spite of its mistaken dicta, the case is authoritative and some more tenable ground must be found on which to place the decision. It will probably be found in the later case of Postal Tel. Cable Co. vs. Adams, 155 U. S. 688, followed in Western Union Tel. vs. Taggert, 163 U. S. 1; Adams Express Co. vs. Ohio, 165 U. S., 194. A statute of Mississippi laid upon all telegraph companies, domestic as well as foreign a tax for the privilege of carrying on their business graduated in each case upon the amount of property in miles and

its valu-, and exempted them from all other taxation. It was found in the case that the burden of this tax was less than the ordinary tax on the same amount of property. The Court said that although a franchise tax upon a corporation engaged in interstat commerce is invalid, and although this purported to be a franchise tax, yet the substance rather than the shadow was to be looked at. This tax was in lieu of another tax on property, and did in fact stand for a tax on the intangible property within the state and it was therefore valid."

After quoting at length from this case, he concludes:

"And this same reasoning was applied in sustaining a franchise tax which was calculated upon the basis of the intangible property as well as the tangibe property within the state, and on the same principle it has been held in the converse case that though the statute recites that the tax is in lieu of an *ad valorem* tax on property of the company located within the state, it is, if it exceeds the amount which could properly be levied under the property tax law void as a regulation of commerce. (Postal Tel. Cable Co. vs. Richmond, 99 Va. 102; 37 S. E. 789)."

It will thus be seen, in those cases where the amount of the tax is ascertained by a reference to the gross receipts of corporations engaged in interstate commerce, that in every case the taxes are in lieu of all other taxes and are in reality property taxes and the method used is one merely to ascertain the value of the property taxed as property. The fact that the decision in the Maine case distinctly approves the decision in the Steamship case in 122 U. S. and that each successive reference to the Maine case treats it as a commutation or property tax, should relieve the question here involved of all possible doubt.

It seems to have been the generally accepted doctrine throughout the Union that such a tax as that here involved is one levied upon interstate commerce and is therefore invalid; for, to-day Texas is

the only state which after leyying an *ad valorem* tax on all of the property of the interstate carrier undertakes to collect in any form a tax equal to a percentage of the gross interstate receipts ; and Ohio is the only other State which levies a tax in addition to the *ad valorem*, but the Ohio act confines the act strictly to state receipts.

THIRD.

If it should be held, however, that the tax herein involved is an occupation or privilege tax for doing an intra-state business, and the carrier is not at liberty to withdraw from the intra-state business it is, under the decision of this Court, a burden upon interstate commerce.

Pullman Co. vs. Adams, 189 U. S. 420, involved a tax imposed by sections 3317 and 3387 of the Mississippi Code of $100 on each sleeping or palace car company carrying passengers from one point to another within the state, and twenty-five cents per mile for each mile of railroad in the state over which the company runs. The Pullman Company urged against this tax that inasmuch as under the constitution of the state of Mississippi the Pullman Co. was made a common carrier, it was not at liberty to withdraw from the intra-state business ; that this business was a mere incident to its interstate business, and that therefore the tax while nominally levied exclusively on the intra-state occupation, was in reality a burden upon its interstate business. It will be noted that the tax in that case purported specifically by its terms to be for the privilege of exercising the intrastate business.

The tax here involved has no such limitation. It is levied upon the entire occupation both state and interstate, and lest there might be some misapprehension of the intention of the Texas Legislature to tax the interstate occupation and gather in the receipts from interstate and foreign commerce, the words " within the state " wherever found in the bill were carefully stricken out, and instead thereof, the phrase was used, as descriptive of the receipts sought to be appropriated, " from every source whatever."

Referring to the defense made, Mr. Justice HOLMES states that if the constitution of Mississippi had the effect which the Pullman Company contended, and that if the company had not the right to withdraw from the intra-state business the tax would be void. He accepts, however, the finding of the Supreme Court of Mississippi to the effect that such was not the case, and that the Pullman Company did have the right at its pleasure to withdraw from the business. He says:

> " If the clause of the state constitution referred to were held to impose the obligations supposed and to be valid, we assume without discussion that the tax would be invalid, for then it would seem to be true that the state constitution and the statute combined, would impose a burden on commerce between the states analogous to that which was held bad in Crutcher vs. Kentucky, 141 U. S., 47. On the other hand, if the Pullman Company whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the state, the case is governed by Osborne vs. Florida, 164 U. S., 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax."

Following this decision was the case of *Allen vs. Pullman Co.*, 191 U. S., 171, on error from the Supreme Court of Tennessee.

Two statutes of the State of Tennessee were involved,—that of 1887 to the effect that sleeping car companies doing business in the state should pay a certain sum per annum per car and which by its terms applied to cars running through the state as well as to those operated wholly in the state; and that of 1889 which levied a tax of $3,000. per annum in lieu of all other taxes except *ad valorem* taxes and which was limited to the intra-state business. The first was held invalid, the court speaking through Mr. Justice DAY, saying:

> "In *Osborne vs. Florida*, 164 U. S. 650, a license tax upon express companies was sustained in view of the decision of the Supreme Court of that state, that it affected only business of the company within the state. The statute now under consideration requires payment of the sum exacted for the privilege of doing any business when the principal thing to be done is interstate traffic. We are not at liberty to read into the statute terms not found therein, or necessarily implied, with a view to limiting the tax to local business which the Legislature in the terms of the act imposed upon the entire business of the company. We are of opinion that taxes exacted under the act of 1887 are void as an attempt by the state to impose a burden upon interstate commerce."

The latter statute was sustained. The court in its opinion laying stress upon the proposition that under Article 3046 of the Tennessee Code, no carrier is required to admit any passenger to his car or means of transportation, and that therefore the Pullman Company was at perfect liberty to withdraw if it should see fit, from business within the State of Tennessee. Referring to the case above cited, it is said at p. 181:

> "Upon this proposition we are unable to distinguish this case from Pullman Co. vs. Adams, 189 U. S. 420 decided at the last term wherein it was held that the privilege tax imposed by the State of Mississippi upon each car carrying passengers from one point in the state to another therein, was a valid tax, notwithstanding the fact that the com-

> pany offered to show that its receipts from the carrying of the passengers named did not equal the expenses chargeable against such receipts."

This conclusion was based upon the right of the company to abandon the business if it saw fit. It was urged that under the constitution of Mississippi the Pullman Company was a common carrier required to carry passengers, and therefore could not be taxed for the privilege of doing that which it was compelled to do. But in view of the decision of the Supreme Court of Mississippi sustaining the tax, it was assumed that no such objection existed under the state constitution.

These two cases, therefore, hold that where under the guise of a tax on the domestic occupation a burden is laid on interstate receipts when the carrier is not at liberty to withdraw from the intra-state business and thereby relieve itself from the burden placed upon its interstate business, the tax is invalid.

Nor is there anything to the contrary in Kehrer vs. Stewart, 197 U. S. 60. As stated by Mr. Beale in the quotation above made, there is a logical and necessary distinction between corporations of a quasi-public nature performing duties from which they cannot withdraw and those of strictly private characters.

In the case at bar, the plaintiffs in error did pay their full quota of *ad valorem* taxation upon their property within the state which is assessed and valued as all other property. As stated by the Supreme Court of Texas in *State vs. A. & N. W. Railway Co.*, 94 Texas 530, the valuation of their real and tangible properties includes their franchise values. In addition to this, they pay a franchise tax. In addition to all this, each has paid for the very year involved in this controversy a tax of one per cent on its passenger receipts within the state of Texas.

The intra-state business of plaintiff in error, the Galveston, Har-

risburg & San Antonio Railway Co. is approximately one-fourth of its interstate business. The intra-state traffic of the Galveston, Houston & Northern Railway Company, is approximately one-fourth of its interstate traffic. Taking the receipts of the railway companies of the state as a whole, the interstate receipts are far more than one-half of the intra-state receipts.

It is admitted without controversy herein that plaintiffs in error under the constitution and laws of the State of Texas are unable to withdraw from the intra-state business. Statutes too numerous to be quoted here, impose extraordinary penalties for failure to run trains, freight and passenger, within the state; for failure to receive freight; for failure to receive passengers; for failure to maintain adequate depots; for failure to make connection and deliver freight to connecting lines; for failure to run on schedule time, etc., etc.

These references indicate but in a slight degree the extraordinary penalties provided in Texas for failure to do the intra-state business. In addition to all this, charter forfeitures are provided. The railroad company is therefore utterly unable to withdraw from the intra-state business. It must pursue that business even though at a loss, under the penalty of bankruptcy and forfeiture of its charter. Now, under this act, it is compelled to pay a tax for the privilege of doing that for which it will be penalized if it does not do, and in the case of plaintiffs in error, from three-fourths to four-fifths of this exaction is demanded from its interstate receipts. Under the decisions above referred to, this is clearly a burden upon the interstate commerce.

FOURTH.

Where the property of a Railway Company engaged in interstate commerce has been assessed, valued, equalized and taxed in the same way as other property situated within the State has been assessed, valued, equalized and taxed, any occupation tax, or tax under any name, whether levied upon the carriers' right to do business in the State or levied against it generally without limitation, and whether taking the form of a certain specific amount or a certain per cent of the receipts derived from its business, is void under the Constitution and Laws of the United States, because it imposes an unjust burden upon an instrumentality of interstate commerce.

The Constitution of the United States grants to Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes. By the Act of Congress of June 15, 1866 (R. S. Art 5258), it is provided: "Every railroad company in the United States whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mail, freight and property on their way from one State to another State, and to receive compensation therefor, and to connect with road of other States so as to form a continuous line for the transportation of the same to the place of destination." Here is distinct authority granted to a railway company whose lines are wholly within one State to engage in interstate commerce and to make the necessary connections and contracts therefor.

In case of *Bowman vs. C. & N. Railway Company*, 125 U. S. 465, and in the case of *Railway Company vs. Richmond*, 86 U. S. 584, this Act has been held to be a valid exercise of the power of Congress to regulate commerce among the States; and in the case of *Union Pacific Railroad Company vs. Chicago, etc., Railroad Company*, 163 U. S., 589, it was held to be a declaration by Congress in favor of the policy of continuous lines and, therefore, as favoring such business arrangements between companies as would make such connections effective, and as indicating the intent, that interstate commercial intercourse should be free. (Judson on Interstate Commerce, page 51).

The answer of plaintiffs in error and the evidence adduced in this case shows that, acting under the authority of the Constitution and laws of the State of Texas and Constitution and laws of the United States, they are and have been since their incorporation engaged in the business of interstate commerce, and that as to such commerce they come within the clause of the Constitution of the United States above quoted and within the provisions of the Act of Congress above quoted, and that they have paid their taxes upon their property on the same proportion of value, duly and legally established, as other property situated within the State of Texas has paid and been required to pay. They also allege, which is true, that under the Constitution and laws of the State they cannot cease doing either an interstate or intra-state business as common carriers without forfeiting their charters to do business.

The case of *LeLoup vs. Mobile*, 127 U. S. 640, was one in which the telegraph company had accepted and was acting under the provisions of an Act of Congress passed in 1866 relating to telegraph companies. The effect of this act upon the telegraph Company was to preclude it from abandoning either its intra-state

or interstate business. The Port of Mobile, a municipal corporation, by ordinance imposed a license tax on telegraph companies of $225, and made it an offense to pursue the business without the payment of the tax and the procurement of a license. The telegraph company contested the validity of this tax. In reversing the judgment of the Supreme Court of Alabama, and holding that the ordinance was void, the Supreme Court of the United States says at p. 648:

> "In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce and amounts to a regulation of it, which belong solely to Congress. This is the result of so many recent cases that citation is hardly necessary."

The Court then cites a large number of cases.

In the case of *Brennan vs. Titusville*, 153 U. S. 289, the Court in the course of their opinion say:

> "It is strongly urged, as if it were a material point, that no discrimination is made between domestic and foreign drummers; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the State."

The act of the Legislature was therefore held void.

In the case of *Railway vs. Backus*, 154 U. S. 445, the Supreme Court said:

> "It has been again and again said by this Court that, while no State could impose any tax or burden upon the privilege of doing the business of interstate commerce, yet it had

> the unquestioned right to place a property tax on the instrumentalities engaged in such commerce. See among many other cases, Marye vs. Baltimore & Ohio R. R., 127 U. S. 117 ; Pullman's Palace Car Co. vs. Pennsylvania, 141 U. S. 18. The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value."

And again the Court says :

> " All that has been decided is that, beyond the taxation of property, according to the rule of ordinary property taxation, no State shall attempt to impose the added burden of a license or other tax for the privilege of using, constructing, or operating any bridge or other instrumentality of interstate commerce, or for the carrying on of such commerce."

We believe that a careful examination of the authorities cited establishes beyond controversy the proposition for which we are contending, viz : That where the State has taxed the property of a corporation engaged in interstate commerce as other property is taxed, and where such corporation cannot go out of the business of handling intra-state commerce, the State cannot, in addition thereto, levy an occupation tax or license tax.

Postal Telegraph Co. v. Adams, 155 U. S. 688, thus states the rule :

> " Doubtless no State could add to the taxation of property, according to the rule of ordinary property taxation the burden of a license or other tax in the privilege of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce."

FIFTH.

The tax being void in so far as it applies to receipts from interstate commerce is void as a whole, and the judgment of the Supreme Court of the State of Texas should be reversed and rendered in favor of plaintiffs in error.

This Court having determined that a similar tax as applied to interstate telegrams was a nullity, remanded the case of Telegraph Company vs. Texas to the Supreme Court of Texas to determine whether any part of the act should be enforced, and in 62 Texas 630, that court declared that the act was void as a whole, upon the grounds: (1) That the court could not know that the Legislature would have passed an act restricted only to state telegrams and that if the court could enforce the act as to such telegrams it might be in effect to make a law that the Legislature would not have enacted; and (2) that a tax to be constitutional must be sufficiently certain to enable the tax payer to know what was demanded of him without resorting to litigation to have the same determined. This is substantially the position taken by this court in *Connolly vs. Union Sewer Pipe Co.*, 184 U. S. 540. In that case a separate section of the Anti Trust Law of Illinois exempting farmers and farm products from the provisions of the law was held invalid. The contention was made that the rest of the law might stand. The Court, however, said that where the unconstitutional section is of such importance that it may be reasonably inferred that it was of leading importance in the passage of the act that the court could not determine whether the act as a whole would have been passed without it, and accordingly the entire statute was stricken down.

In Baldwin vs. Franks, 120 U. S. 678, it was held that as a

statute on the subject of conspiracy was unconstitutional as applied to conspiracies against citizens of a state, it could not be enforced as to conspiracies against aliens.

In *United States vs. Reese*, 92 U. S. 214 involving a statute to punish election inspectors for wrongfully receiving votes where there was nothing in the act to limit it to a refusal on account of race, color or previous condition of servitude, the court declaring the act unconstitutional, declining to enforce the same in a case where color was the cause of the refusal. The Court said: "To limit the statute in the manner now asked for, would be to make a new law, not to enforce the old one."

The *Trade Mark cases*, 100 U. S. 82, and the *Virginia Bond cases*, 104 U. S. 269, are in point. In the former case, the Act was held unconstitutional because it embraced intra-state commerce, and in answer to the contention that it should be enforced as applied to interstate and foreign commerce, the court said at p. 99:

> "If we should in the case before us undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we would do what, if the matter were now before that body, it would be unwilling to do."

In the *Ratterman case*, 127 U. S. 411, the Court held that the receipts might be separated and the tax enforced as to the State receipts. That case, however, differed materially from that at bar. Here the language levying the tax as to state and interstate receipts is identically the same, and cannot be limited to state receipts without judicial construction to the extent of reforming the statute. As heretofore shown, the Legislature struck out of the bill as introduced, the words limiting the tax to the intra-state receipts, while carefully preserving the same or similar words in all the other legislation of the same session taxing receipts of other corporations that might be supposed to do both a

state and interstate business. In view of this record, it is a violent presumption that the Legislature would have passed the act applying only to state receipts. It may be that in view of the fact that the State of Texas is crossed by various great systems of railways over which flow a great interstate and transcontinental commerce, it intended to do what it has done in this act, namely, to compel that interstate commerce to render tribute to state necessities.

It is in evidence that that system of railways of which plaintiffs in error are a part, do a large interstate and foreign commerce; that its intra-state business is in reality but an incident to its interstate business; that over it flows a great commerce from ocean to ocean, from which these lines although confined to the State of Texas, collect their appropriate divisions. In the same manner the Gulf, Colorado & Santa Fe by its connections with the Atchison, Topeka & Santa Fe system constitutes a great interstate system of railways reaching from the Gulf of Mexico at Galveston to the great Lakes at Chicago and westward to the ports of the Pacific Ocean. The International & Great Northern Railway by its connections with the Iron Mountain and Great Southern likewise constitutes a great interstate and international highway extending from Laredo on the Mexican border and from Galveston northwardly to St. Louis in connection with the Missouri Pacific and the Wabash systems. The Texas & Pacific likewise which the state attempted to tax under this law, but which as hereafter shown was exempted by the Supreme Court by reason of the fact that it was a Federal corporation, extends from New Orleans westwardly across the entire State of Texas to the City of El Paso.

When it was sought to exclude the interstate receipts from the act and to limit the receipts taxed to those within the state, the Legislature struck out the words "within this state" and in lieu thereof substituted the words "from every source whatsoever",

and the recovery in this case is calculated directly upon such interstate receipts and under the terms of the act and of the intangible law here referred to for every year succeeding 1905, each railroad carrier that declines to pay the intangible tax must yield up to the State of Texas one per cent of its revenues from interstate and foreign commerce.

Again, in the Ratterman case, it was conceded that the interstate receipts and the intra-state receipts could be and were definitely separated. In the case at bar, while a partial separation has been made, a great part of the receipts were incapable of division between the two classes of traffic (R104–108). In view, therefore, of the unquestioned intention of the Legislature to levy a tax upon the interstate receipts as well as the intra-state receipts, and that as to these plaintiffs in error the greater portion of the tax is received from such interstate receipts and with reference to the receipts of railway carriers in the State of Texas as a whole, at least one-half would be derived from interstate receipts, it is clear that the Court cannot assume that the Legislature might have passed the act if applied solely to intra-state receipts, and therefore the act should be declared void as a whole.

The tax herein imposed is invalid in so far as it seeks to appropriate one per cent of the revenues of the carriers subject thereto from the carriage of the mails state and interstate. The testimony shows that from the carriage of mails, the Galveston, Harrisburg & San Antonio Railway Company receives $129,160.22; the New York, Texas & Mexican Ry. Co., $12,019.87; the Gulf, Western Texas & Pacific Ry. Co., $5,371.17; the Galveston Houston & Northern Railway Company, $6,475.28. (R. 104–105).

The testimony of G. R. Cottingham, Auditor, (R. 63), shows that the revenue from the mail service is incapable of apportionment between the inter- and intra-state traffic. He says (R. 63):

> "That under the head 'Unapportioned' in each of the said reports, as well as in said answers, are included receipts from the items mail, express, extra baggage, switching, car service, and locomotive mileage. That the books of each of said defendant companies are so kept that there is no apportionment of the state and inter-state, and international traffic except as to freight and passenger earnings, respectively. That the said items included under the term unapportioned, as above stated, are not divided between the state and inter-state receipts and are not so entered upon the books. That said items are incapable of a correct apportionment. That under the item 'mail' is included compensation for transportation of the United States Mail both between points wholly within the State of Texas and to and from points without the State of Texas, and it is impossible to apportion such receipts."

It therefore appears that the tax levied by the Act, and to be collected by the judgment herein, is taken from the receipts paid to plaintiffs in error by the government of the United States for the

carriage of its mail both state and interstate. The carriage of the mail is military [illegible] United States (See Section 3941-4061, Title 46 R. S. U. S.).

If a tax on the income of a Federal office is a tax on the office; if a tax on the income from bonds of the United States is a tax on a Federal agency; if an occupation tax imposed on a corporation deriving its franchise from the Federal government is a tax on a Federal agency; it would seem equally clear that a tax imposed by the State upon the fees paid the carrier by the Federal Government for the discharge of one of its most important functions is equally a tax upon a Federal agency, and in direct conflict with those provisions of the Federal Constitution which provide that the Constitution of the United States shall be supreme law of the land; that Congress shall have power to establish post-offices and post-roads, and that which commits to its exclusive jurisdiction the regulation of interstate commerce.

It is intimated in McCulloch vs. Maryland, 4 Wheat., 316, that a State would have no right to tax a patent right. The interference with the functions of the Federal Government is more direct in the present instance. In carrying the United States Mail, the railroad company discharges directly a duty, the performance of which is exclusively committed to the Federal Government. If the State can impose a tax of one per cent, why not ten, fifteen or twenty? and thus prevent the Government from employing mail carriers within the State. Commenting upon this proposition, GRAY, in "Limitations of Taxing Power", Par. 772, says:

> "Can earnings derived from the carriage of the United States mails be made the subject of state taxation by franchise or excise tax on the corporations carrying them? This question was presented, but not decided in a New York case [People vs. Morgan, 168 N. Y., 1, 60 N. E., 1041]. The statute in question imposed an 'excise tax or license

> fee' on transportation companies, computed on the basis of its gross earnings on business 'originating and terminating within the state'. As to interstate mails, such a tax would doubtless be invalid. As to intra-state mails, if invalid, it would be so as a tax on a Federal agency, and such is probably the law. Such a tax would be clearly a burden on the *operations* of the Federal agency; the power to tax those operations directly or indirectly would involve the power to increase the cost of transmission to a burdensome point."

The Court of Appeals in New York in the case cited by the author found it unnecessary to decide the question here raised; but held that inasmuch as the New York Act confined the tax to receipts from exclusively intra-state traffic and the receipts from the mail being classified as unapportioned, it devolved upon the State to show at least what part was derived from interstate and what from intra-state carriage, and that having failed to do so it was not entitled to collect upon any portion of the receipts derived from that source. It would seem, therefore, that the opinion expressed by the author, as well as the conclusions given in paragraph 774 of the volume above cited, to the effect that the operations of any corporation or individual employed as a Federal agency are exempt from a State taxation; and in determining whether any corporation is exempt from State taxation to any extent by reason of employment in the Federal service, it is not material whether it owes its creation to Federal or to State authority. The character of the service and not the nature of the corporation is to be considered.

SEVENTH.

The tax imposed by the Act is violative of the 14th Amendment to the Constitution of the United States, and denies plaintiffs in error due process of law and the equal protection of the law in the following particulars.

1. It is limited in its operation to railroad carriers, while carriers by water and electric railways and other carriers are not subject thereto.

2. The Texas & Pacific Railway Company, a railway corporation with a line extending from New Orleans across the length and breadth of the State, being chartered under the Federal law, is exempted from its operation.

3. The tax pretended to be levied for the privilege of exercising intra-state business is measured by the interstate receipts. Therefore, a corporation doing a large interstate and foreign business and a small intra-state business will for the conducting of that business be charged a much greater tax than a corporation doing a large intra-state and a small interstate business, producing the grossest inequality and discrimination in taxation.

4. The tax imposed is in reality an income tax. Since no like income tax is imposed by the laws of the State of Texas on other persons or corporations, the equal protection of the law is denied.

5. Plaintiffs in error for the period covered by the tax are taxed upon the values of their properties as other tax-payers in the State upon an *ad valorem* rate. They are further taxed upon their franchises. They have also been compelled to pay a tax of one per cent. of their gross passenger earnings within the state for the same

period. To levy, therefore, in addition to this burden of taxation, an additional tax of one per cent. on the gross product of the property, denies them the equal protection of the law and due process of law.

We are not unmindful of the fact that the power of classification for the purposes of taxation has been extended to great lengths by the authorities. It, nevertheless, has its limits. (See *Cotting vs. Kansas City Stock Yards*, 183 U. S. 79; *G. C. & S. F. vs. Ellis*, 165 U. S. 150).

It is shown in this case by the testimony of C. K. Dunlap, General Freight Agent of plaintiff in error, and by A. C. Fonder, Asst. Gen. Freight Agent of the Gulf Colorado & Santa Fe (R. 67 and 70) that a large transportation business, particularly of freight, is conducted by common carriers by water in the State of Texas, and that this competition immediately and directly affects and controls to a large extent the freights charged by the various common carriers in the State of Texas by rail, and especially the plaintiffs in error. It is also shown by the testimony of T. J. Freeman (R. 100–101) that there are numerous electric railways in the State of Texas not subject to the tax which do the same character of business as the steam railways, as, for instance, the Northern Texas Traction Company between Ft. Worth and Dallas, two of the largest cities in the State, the Sherman and Denison interurban railway and others.

That the protection of the 14th Amendment to the Constitution extends to matters of taxation is now well settled. (*County of Santa Clara vs. S. P. Ry. Co.*, 18 Fed. Rep., 385; *County of San Mateo vs. S. P. Ry. Co.*, 13 Fed. Rep., 722; *Taylor vs. L. & N. Ry. Co.*, 88 Fed. Rep., 350; *Chicago Union Traction Co. vs. State Board*, 114 Fed. Rep., 557; *Railroad and Telegraph Co. vs. Board of Equalizers*, 85 Fed. Rep., 302).

No principle of classification can differentiate between steam railways and electric railways engaged in exactly the same character of transportation service. These observations apply with equal force to common carriers by water. Yet, the statute is limited to steam railroads, and as construed and enforced by the authorities of the State has no application to any other character of common character, except steam railways.

Again, it was set up in the answers of these companies that if the tax should be held to be an occupation tax, it could have no application to the Texas & Pacific Railway Company, which received its corporate rights from the Federal Government; and this company, owning a railway extending across the entire state and in active competition with the other railways thereof subject to the provisions of the Act, to impose a burden of this character not likewise imposed upon the Texas & Pacific Railway Company would be such an oppressive discrimination as to deny them the equal protection of the law. It is admitted (R. 57) that the Texas & Pacific Railway Company was incorporated under Act of Congress approved March 3, 1871, and Acts amendatory thereof. As shown by copy of the official map of the Railroad Commission of Texas (R. 102) and by the evidence, the Texas & Pacific Railway extends from New Orleans in Louisiana through the State of Louisiana, entering the State of Texas at the State Line at Waskom, and extends westwardly through Ft. Worth and Dallas to El Paso, with a mileage in the State of 1130 miles, with gross receipts of $12,642,340.64, of which $3,838,826.69 is received from intra-state traffic (Texas); $2,376,893.71 is received from the Louisiana and Arkansas traffic, and $5,454,375.53 from interstate and foreign traffic.

It appears also from the testimony of T. J. Freeman (R., 100) that this road is competitive both for freight and passenger traffic

with the various other roads involved in this controversy on both State and interstate traffic ; state traffic at all junction points, and interstate traffic, we might say, from every point in the United States. It was so during the year ending June 30, 1905, and is so now. The trial court held that its Federal charter was no protection to this Company, but the Supreme Court of Texas in the case of *State vs. Texas & Pacific Ry. Co.*, 98 S. W., 834, upon the authority of the *Pacific Railroad Removal Cases*, 115 U. S., 2, *United States vs. Union Pacific Railroad Company*, 91 U. S., 72, *California vs. Central Pacific Ry. Co.*, 127 U. S., 1, held that the tax was invalid as applied to that company. It thus appears that not only are the electric railway lines and the water lines active competitors of the steam railway lines exempted from this tax upon their gross receipts, but that a railway with the largest gross receipts of any company in the State, penetrating its richest sections, doing a state business of almost four millions of dollars, and competing at every point for domestic, foreign and interstate business, is likewise exempt from the burdens of this tax ; that such discrimination in fact is actually accute and oppressive, of course, cannot be denied.

It is believed that no State enactment presents such an array of discriminatory provisions as does this tax. As construed by the Supreme Court of the State of Texas, it is called an occupation tax for the privilege of doing an intra-state business. Now this tax is not measured by the receipts from the intra-state business, but by receipts from a wholly foreign and distant source, to-wit, the interstate business. Its operation results in the grossest inequalities. For example :

The Galveston, Harrisburg & San Antonio Railway Company with total receipts of $7,472,458.47 would be due an annual tax of $74,724.58. Its receipts from interstate traffic are $5,209,389.79 ;

its receipts from intra-state traffic are $1,578,744.11. The tax paid, therefore, would be approximately five per cent. of the receipt from the occupation taxed.

The Houston & Texas Central Railroad Company (R. 106) with gross receipts of $5,400,411.98, received from interstate traffic $2,211,365.94, and from intra-state traffic $2,897,705.33. The tax levied, therefore, upon the Houston & Texas Central R. R. Co. would be approximately two per cent. of the receipts from the business taxed.

In other words, the Galveston, Harrisburg & San Antonio Railway Company pays double the per cent. of the receipts from the business taxed as does its competitor, the Houston & Texas Central Railroad Company. Other illustrations present the discrimination acutely.

The St. Louis, San Francisco & Texas Railway Company (R. 107) with total receipts of $597,905.60, and interstate business of $501,987.03, pays a total annual tax, therefore, of $5,970.05, or something more than six per cent. of its intra-state business.

The Galveston, Houston & Henderson Railroad Company, upon the other hand, with a total business of $416,160.00, does an interstate business of $39,048.85, an intra-state business of $223,969.06. Its tax, therefore, is approximately less than two per cent. of the receipts from the business taxed; that is to say, the St. Louis, San Francisco & Texas Railway Company pays more than three times as much as does the Galveston, Houston & Henderson Railroad Company for the privilege of doing an intra-state business. These examples could be multiplied by comparing the receipts of the various companies as set out in the Record, pages 104 to 108.

Again, by whatever name this tax may be called, it is in effect an income tax appropriating one per cent. of the gross receipts of the properties of the various railways of Texas, except the Texas &

Pacific Railway Company. Under the provisions of Section 1, Article 8, the Legislature of Texas has the right to levy an income tax upon both natural persons and corporations, with the limitation that "taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations other than municipal, shall pay a tax in proportion to its value, which shall be ascertained as may be provided by law." (Section 1, Art. 8, Constitution of Texas.)

No like income tax is imposed upon any other person or corporation in the State. Indeed, under the provisions of Section 19 of Article 8 of the Constitution of Texas "Farm products in the hands of the producer, and family supplies for home and farm use are exempt from taxation, until otherwise directed by a two-thirds vote of all the members elect to both Houses of the Legislature."

It is shown by the record (Par. 6, Agreement between Counsel, R. 58, Exhibit B, p. 35) that the property of the Galveston, Harrisburg & San Antonio Ry. Co. for the year 1905 had been assessed, equalized and taxed at the sum of $12,107,119.50; that of the New York, Texas & Mexican Railway Company, $1,542,949.00; the Gulf, Western Texas & Pacific Railway Company, $1,006,435.80; and that of the Galveston, Houston & Northern Railway Company, $765,985.00; that these companies had paid all of the *ad valorem* tax due the State of Texas, and the several counties, municipalities and school districts for all the years preceding the year involved herein, and were continuing to pay approximately upon these valuations.

In addition to this, as certified by the Comptroller of Public Accounts (R. 61), each of these companies had paid a tax of one per cent. on its Gross Passenger Receipts from travel within the State for the period from July 1, 1904, to June 30, 1905.

As a further burden, they had paid franchise tax for the year ending 1905, as appears from certificates of the Comptroller (R.

60). This Court has held in the Income Tax Cases, 157 U. S. 429, that to tax the income from personal property or real property is to tax the thing itself; in other words, that an income tax on the product of property either real or personal is a tax upon the property itself. For this reason, doubtless the Constitutional Convention while giving the Legislature of Texas power to levy an income tax upon persons and corporations, provided that farm products in the hands of the producer should not be taxed. Here, the State first taxes the property at the same *ad valorem* rate as other property real and personal in the state; proceeding further if taxes the franchise of the corporation owning the property; it then taxes under the guise of an occupation tax the passenger receipts from passenger travel wholly within the State at the rate of one per cent on the gross receipts of the corporation, thus again taxing the same passenger receipts that it had already taxed, and taxing the products of the same property that had already paid its full quota of *ad valorem* taxation. No income tax of any kind whatsoever is imposed upon persons or individuals in the State, and no like income tax is imposed upon any corporation in the State, only a comparatively small number of corporations being snbject to any kind of an income tax, and such tax being limited to receipts from commerce within the State.

The same question was before the Supreme Court of Louisiana, in the case of Parker, Tax Collector, vs. Insurance Company, 42 La., Ann., 428, 7 So. Rep., 599. The tax there imposed was upon the gross receipts of foreign insurance companies doing business in the State. The court held that such a tax was contrary to the equality clause of the Federal Constitution. It said at p. 431:

> "Then the question, simply stated, is whether a property tax levied on the 'gross receipts' of a limited and particular

class of persons, and not levied upon the 'gross receipts' of any other class is valid.

"The plain constitutional mandate that 'all property shall be taxed in proportion to its value' would seem peremptorily to settle this question. If 'gross receipts' be properly subject to taxation, the 'gross receipts' of all or of none must be taxed.

"It is vain to call 'gross receipts' 'capital'. They are not 'capital' or 'capital stock,' and no legislative declaration can make them so.

"The only class of taxes under which this can possibly fall is that of an 'income tax.'

"It is not necessary for us to decide whether or not, under the constitution, the Legislature has power to levy an income tax. It suffices to say that, if the Legislature had such power, it would be an indispensable condition of its exercise that the tax should embrace the incomes of all persons not exempted; and, whatever power of classification the Legislature might possess as to the subject-matter of taxation, that power could under no pretext be stretched so as to embrace the right to single out a particular class of taxpayers, and to require them to pay such a tax while exempting all others.

"This is what the Legislature has attempted to do in this instance, and we are bound to hold that it cannot be constitutionally done.

"As we have heretofore intimated, if this Act merely imposed on the foreign insurance company the duty of paying to the State a certain *percentage* of its premiums received as the condition of a permissive license to transact business in this State, different questions would be presented. That would not be a tax, and would not involve the exercise of the taxing power.

"But the imposition here is levied as a tax, assessed as a tax, claimed as a tax, by the tax collector, under proceedings provided exclusively for the collection of taxes. It is a distinct exercise of the taxing power, and must be governed by all constitutional requirements and limitations applicable thereto."

While the corporation involved in that case was a foreign corporation, it is not conceived that that distinction had any weight

in the disposition of the case. The court holds that whatever power of classification the Legislature might possess as to the subject-matter of taxation, that power could under no pretext be stretched so as to embrace the right to single out a particular class of taxpayers and exempt all others. It is believed, therefore, that this tax denies the plaintiffs in error due process of law, as well as the equal protection of the law, contrary to the 14th Amendment to the Constitution of the United States.

Respectfully submitted, with the prayer that the cause be reversed and rendered in favor of plaintiffs in error; or, in the alternative, that the same be reversed and remanded.

BAKER, BOTTS, PARKER & GARWOOD,

Attorneys for Plaintiffs in Error.

ROBERT S. LOVETT,

MAXWELL EVARTS,

HIRAM M. GARWOOD,

Of Counsel.

APPENDIX.

"Exhibit A."

RAILROADS—PROVIDING FOR THE LEVY, ASSESSMENT AND COLLECTION OF A TAX ON THE GROSS RECEIPTS OF.

(H. B. No. 52.)

CHAPTER 141.

An Act imposing a tax upon railroad corporations, the receivers thereof, and other persons, firms and associations of persons owning, operating, managing or controlling any line of railroad in this State, for the transportation of passengers, freight and baggage, or either, equal to one per cent of their gross receipts, and providing for the collection and payment thereof; and repealing the existing tax on the gross passenger earnings of railroads.

SECTION 1. *Be it enacted by the Legislature of the State of Texas:* Every railroad corporation, or the receiver thereof, and every other person, firm or association of persons, owning, operating, managing or controlling any line of railroad in this State, for the transportation of passengers, freight and baggage, or either, shall pay to the State an annual tax for the year 1905, and for each calendar year thereafter, equal to one per centum of its gross receipts, if such line of railroad lies wholly within the State; and if such line of railroad lies partly within and partly without the State, it shall pay a tax equal to such proportion of the said one per centum of its gross receipts as the length of the portion of such line within the State bears to the whole length of such line; provided, that if satisfactory eveidence is submitted to the Comptroller at any time prior to the date fixed in Section 2 of this Act for the payment of the tax herein imposed, that any other proportion more fairly represents the proportion which the gross receipts of any such railroad for any year within this State bears to its total gross receipts,

it shall be his duty to levy and collect for such year from such railroad a tax equal to such other proportion of one per centum of its total gross receipts.

SEC. 2. For the purpose of determining the amount of such tax, the president, vice president, general manager, treasurer or superintendent of such railroad corporation, or the receiver thereof, or such other person, firm or association of persons shall, on or before the first day of October, 1905, and annually thereafter, report to the Comptroller of Public Accounts, under oath, the gross receipts of such line of railroad, from every source whatsoever, for the year ending on the 30th day of June last preceding, and shall immediately pay to the State Treasurer the annual tax herein imposed, calculated on the gross receipts so reported. The Comptroller shall have power to require such other reports and affidavits as may in his judgment be necessary to protect the interests of the State, and he shall estimate such tax on the true gross receipts thereby disclosed, and assess and enforce the collection of such tax.

SEC. 3. Every person required to make reports by this Act, or by the Comptroller of Public Accounts, under the powers herein given, who shall fail or refuse to make such reports, for a longer period than thirty days, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than one hundred nor more than five hundred dollars, and each day of failure or refusal after said thirty days shall constitute a separate offence.

SEC. 4. Should such report not be filed with the Comptroller, and the annual tax thereon estimated paid to the Treasurer on or before the first day of October of any year, a penalty of ten per centum upon the amount of such tax shall accrue thereon and be added thereto; and in case such report is not made or such tax and the penalty thereon are not paid on or before the first day of November thereafter, or in case of a failure to furnish the additional report or affidavit required by the Comptroller, for a longer period than thirty days, after demand therefor, or in case of failure to pay within thirty days any tax or additional tax assessed by the Comptroller, under this Act, every such railroad corporation, or receiver thereof, or other such person, firm or association of persons shall forfeit and pay to the State the sum of two hundred dollars for each day of any of said reports or payments may be delayed, after the expiration of such periods respectively.

SEC. 5. The Attorney General is authorized and required, upon request by the Comptroller, to bring suit in the name of the State, in Travis County, against the proper parties defendant, to recover all taxes, penalties and forfeitures mentioned in this Act, and venue and jurisdiction of such suits is hereby expressly conferred upon the courts of Travis County. Service of all process issued in such suits may be had upon any officer or agent of such person, firm, association or persons, corporation, or receiver thereof, within this State, and such service shall in all respects be held legal and valid.

SEC. 6. The tax provided for by this Act shall be in addition to all other taxes levied by law. Sub-division 36, of Article 5049, Revised Statutes of 1895, and any existing statute imposing a tax upon the gross passenger earnings of railroads, is hereby repealed.

SEC. 7. The tax imposed by this Act shall not be levied upon or collected from any person, firm, association, corporation, or receiver owning, operating, managing or controlling any line of railroad in this State after such person, firm, association, corporation, or receiver shall have paid the tax upon its intangible assets as provided for in an Act of the Twenty-ninth Legislature entitled "An Act for the taxation of the intangible assets of certain corporations, and to provide for the creation of a State Tax Board for the valuation of such intangible assets, and for the distribution of said valuation for local taxation, and for the assessment of said assets, and the levy and collection of taxes thereon," while the same may be in force and effect.

SEC. 8. The depleted condition of the Treasury, and the fact that the railroads of the State under existing laws pay far less than their fair share of the expenses of the State government, creates an emergency within the meaning of the constitution, and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and that this Act take effect and be in force from and after its passage; and it is so enacted.

(Note.—The enrolled bill shows that the foregoing act passed the House of Representatives by the following vote, yeas 70, nays 31; it was referred to the Senate where it was amended and passed by a two-thirds vote, yeas 29, nays 1; The House of Representatives concurred in the Senate amendments, no vote given.)

Approved April 17, 1905.

Takes effect 90 days after adjournment

"Exhibit B."

TAXES—PROVIDING FOR TAXING INTANGIBLE ASSETS OF CERTAIN CORPORATIONS.

(H. B. No. 22.)

CHAPTER 146.

An Act for the taxation of the intangible assets of certain corporations, associations and individuals, and to provide for the creation of a State Tax Board, for the valuation of such intangible assets, and for the distribution of said values for local taxation, and for the assessment of said assets, and the levy and collection of taxes thereon; and to provide for the repeal of all laws and parts of laws laying taxes on the gross incomes of the corporations, associations and individuals affected by the provisions of this Act.

SECTION 1. *Be it enacted by the Legislature of the State of Texas:* That each and every incorporated railroad company, ferry company, bridge company, turn-pike or toll road company, wharf company, telegraph company, inter-urban railroad company, express company, chair car company, refrigerator car company, stock car company, tank car company, and every other car company except sleeping car, dining car and palace car companies which are especially excepted from the provisions of this bill, and every packing house company and pipe line company doing business wholly or in part within the State of Texas, whether incorporated under the laws of this State or of any other State, or of any territory or foreign country, and every other company, corporation or association doing business of the same character in this State, and every individual or association of individuals doing such business shall in addition to the *ad valorem* taxes on tangible properties which are now imposed upon them by law, annually, beginning with the first day of January, A. D. 1906, pay a tax to the State for the year 1906, and for each year thereafter on their unrendered intangible assets and property, and local taxes thereon to the counties in which its business is or shall hereafter be carried on, which additional tax shall be assessed and levied upon such

assets and property in the manner hereinafter provided. The place or places where such local taxes are to be paid, and the manner of the apportionment of the same in cases where more than one jurisdiction is entitled to a share of such tax, shall be determined in accordance with the provisions of this Act.

SEC. 2. Between the second day of January and the first day of March of each year, every company, corporation and association embraced within the provisions of the first Section of this Act, or coming otherwise within its scope and intent, shall make out and deliver into the possession of the Comptroller of Public Accounts of the State of Texas a statement containing the information hereinafter prescribed, which statement shall be duly verified by the affidavit of one of the officers of the company, corporation or association in whose behalf it is made.

SEC. 3. Each such statement shall show the following items and particulars as the same stood on the next preceding first day of January, to wit :

1. The name of the company, corporation or association making the statements, and the character of its business.

2. The authority by which it was incorporated, and the purposes of its incorporation as expressed in its charter or articles of association.

3. The locality of its principal office and the amount and kind of business done by it in this State, and the total gross receipts derived from its business therein, including a due proportion of its inter-state business, if it has done any business of that character.

4. Its total capital stock and the number of shares which have been issued and are outstanding, and the par or face value of each such share.

5. The market value of the said shares of stock, or, if they have no market value, then the statement must show the actual value thereof.

6. A brief description of each tract of real estate and of the improvements thereon, and of the buildings, structures, machinery, fixtures, appliances and other tangible property and assets owned and assessed or liable to assessment for the same year within this State, and the location and assessed value thereof and the county, city or town wherein the same is assessed for taxation for State and county purposes, or is liable to assessment.

7. A brief description of each tract of land and of the improvements thereon, and of the buildings, structures, machinery, fixtures

and appliances, and of the other tangible property and assets owned and held outside of the State, and of all other property and assets having fixed situs outside thereof, and the location of each item of such property, and the purpose for which it is used, and whether or not it is specifically used in the business of the company, corporation or association making the report, and its true and fair market value, and the sum or value at which it is assessed for taxation, and the locality in which it is assessed.

8. A statement of each and every lien, mortgage and other charge upon the whole or any part of the property of said company, corporation or association, with a statement of the property encumbered or charged thereby and of the amount of unpaid debt secured by each such mortgage, lien or charge, and of the interest charged thereon, and to what extent interest has been paid, and the true and fair market value of every such debt.

9. A statement of the gross and net income and earnings for the next preceding twelve months, including therein all interest on investments, and all rents, fruits, revenues and receipts from every source whatsoever, and a statement of the income used for repairs and of the amount used for betterments, and the amount used for extensions; and each pipe line company shall include as a part of its gross receipts such sum or sums as it would have been compelled to pay out for conveying its own product, if another company had conveyed same for it.

10. Every railroad company and every telegraph company, and every pipe line company shall show in each statement made by it the following particulars, which are in addition to the foregoing requirements, to-wit: *(a)* the total length of all of the lines of said company, whether within or outside of this State, and *(b)* the total length of so much of said lines as are within this State, and *(c)* the length of its lines in each of the counties of this State into which its lines extend. The length of the lines of the telegraph companies shall be estimated and stated according to its mileage of poles, conduits, and cables, or either.

11. Every refrigerating car company, chair car company, stock car company, tank car company and every other car company, except sleeping car companies, dining car companies and palace car companies, which are especially excepted from the provisions of this bill, and except railroad companies under the control of the Texas Railroad Commission, shall also in addition to the said foregoing requirements, show by each of its said statements, *(a)*

the total mileage travelled by the cars of said company during the next preceding twelve months, whether within this State or beyond its borders, and *(b)* the total mileage travelled by such cars within the State during the same period, and *(c)* the mileage traveled by such cars within each county in this State during said period.

12. Every Express company shall also in addition to the foregoing requirements having application to such companies, show *(a)* its total gross receipts for all business done under its charter, whether within this State or outside of it, during the next preceding twelve months, and *(b)* its total gross receips within this State for the same kind of business done during the same period, including a due proportion of receipts from interstate business, and *(c)* its total gross receipts in each county in this State for the same kind of business done during the same period.

SEC. 4. The State Comptroller of Public Accounts shall receive all tax statements offered to him under the provisions hereof, and he shall endorse upon each the date upon which he received it, signing the endorsement officially. He shall examine the statements as soon as may be practicable, and if any of them are insufficient, or if he shall believe other or further information to be necessary, he shall at once demand such additional statements and information as he may think proper.

SEC. 5. On the first Monday after the first day of March of each year, or as soon thereafter as may be practicable, the said Comptroller shall place all facts and statements, and all information relating thereto which he has received, before a State Tax Board, which is hereby created, and which shall consist of the Comptroller of Public Accounts and the Secretary of State and of a third member, to be known as the Tax Commissioner of the State of Texas, who shall be appointed by the Governor, with the advice and consent of the Senate, subject to the provisions of Section 12 of Article 4 of the State Constitution. The Tax Commissioner shall hold office for two years, and until his successer is appointed and qualified, and shall receive an annual compensation of two thousand five hundred dollars ($2,500), in equal installments, payable at the end of each month.

SEC. 6. Said State Tax Board shall carefully examine and consider the said statements and information, and shall hear evidence and secure further and additional information so far as may be in their power, to show the true value of the properties aforesaid, and

the true value of that portion of every such property, which is situated within this State and within the respective counties, and each interested company, corporation and association may appear and introduce material and relevant testimony before said board, touching the true value of its said property within this State, and the apportionment thereof, and the board shall have full power to summon and swear witnesses. From the statements, evidence and information adduced before it, the State Tax Board shall ascertain, fix, and determine the true value of each such property, and of the portion thereof which is situated within this State, and the respective values of the several portions within the different counties thereof, in which any such portions are taxable, and for that purpose said board may require and compel any person or persons, or the officers and agents, or any of them, of any company, corporation or association embraced within the terms of this Act, to appear before it with such books, papers, documents and information as the board may require, and to submit themselves to examination by the board.

SEC. 7. In so far as the other evidence and information adduced before them does not make it appear to the members of the said State Tax Board improper or unjust for them to do so, said board shall, in fixing the true cash value of the entire property of any company, corporation or association embraced within the provisions hereof, take as a basis therefor the aggregate market or true value of all its shares of stock, adding thereto the aggregate market or true value of all indebtedness, secured by any mortgage, lien or other charge upon its property or assets, and the sum so produced shall be deemed and treated as the true cash value of said entire property. And, in cases where the company, corporation or association does business and has property both within this State and outside of it, in ascertaining the true cash value of its property within this State, said State Tax Board, shall next ascertain from the said statements, or otherwise, the market or true value in the locality where the same is situated, of each of the several pieces of real estate situated outside of this State, and of its other properties, if any, outside thereof, and not specifically used in the business of said company, corporation or association, and the aggregate of said values shall be deducted from the gross value of the property as above ascertained, and the result of the said deduction, and the sum or value thereby produced shall be deemed and treated as the true cash value of all the property of the said company, corporation or

association in actual use in its business. The said State Tax Board shall then fix the value of the property within this State, using as a basis and being guided so far as it shall not believe it unjust to do so, by the proportion which it finds to exist between the total lines or total receipts both within this State and outside of it, and the lines controlled or operated, or the receipts obtained entirely within this State, so that there shall be apportioned to this State, as the true value of the property within its borders of each company, corporation, person and association doing business within and outside of its limits, such a portion of the cash value of all of the property of such company, corporation, individual or association which is specifically used in its business, as is borne by its total lines or total receipts within this State, when compared with the total lines or total receipts both inside and outside of the State of Texas. From the entire value of the property within this State, when ascertained as directed by this Act, the said State Tax Board shall deduct the assessed value for taxation of all the property and assets of said company, corporation or association, as the same is found to be assessed for State and county taxation, in the locality wherein the same is legally taxable, and the residue and remainder of value shall be by the said board fixed and determined as the true value of the unassessed franchises and intangible properties owned and held by said company, corporation or association within this State. The said State Tax Board shall apportion the sum of the said total taxable values within the State, among and between the counties in which such company, corporation or association does business, in proportion to the amount of business done in and the receipts derived from each locality, except that in case of a railroad company, or of a car company, or of a telegraph company, then the apportionment to each county shall be in proportion to the line or car mileage therein, provided, however, that the said Tax Board shall have the right and it is hereby declared to be its duty to make use of all evidence put before it, and of all material facts at its command in valuing and in apportioning the values of the aforesaid properties, and if it shall believe some other method of calculation than that herein specifically prescribed is necessary in order to produce just and lawful results, it shall follow the method which under all the circumstances, it believes best calculated to bring about a fair and equitable valuation and apportionment of such property.

SEC. 8. Whenever any person or association of persons, not

being a corporation, nor having a capital stock, shall engage in this State in any character of business embraced within this Act, then the capital and property, or the certificates or other evidences of the rights or interests of the persons engaged in such business shall be deemed and treated as the capital stock of such person or association of persons for the purposes of taxation, and for all other purposes under this Act, and shall be estimated and valued, and the unassessed intangible property values thereof when ascertained shall be apportioned and distributed and assessed and taxed under the provisions hereof in like manner as if such person or association of persons were a corporation, and each such person and association of persons shall annually within the time and in the manner herein provided, make the statements and reports and give the information required by this Act of the aforesaid companies, corporation and associations, and shall be subject to all penalties herein fixed, and to all the terms and provisions of this Act.

SEC. 9. The State Tax Board, after having first determined and fixed the true cash value of the unassessed intangible property within the State of Texas of the before-mentioned individuals, companies, corporations and associations, in accordance with the provisions hereof, shall, annually, on or before the thirtieth day of May each year, report to the tax assessor of every county in this State in which any of said intangible and unassessed property is taxable under this Act, a description of the property taxable therein, and the value thereof apportioned to said county, and the name and residence or place of business of the owner, and all other necessary particulars, and the said property shall thereupon be assessed by the assessor for taxation in like manner as other property, and shall be equalized and taxed and the taxes collected as in the case of other property. And so long as any corporation, company, or association shall pay all *ad valorem* taxes required by law, the individual stockholders shall not be required to list its shares for taxation, or to pay *ad valorem* taxes on said shares, nor shall any company, corporation, association, person or persons complying with the provisions of this Act, be required to pay any other State or county *ad valorem* taxes on any of its intangible assets in Texas.

SEC. 10. Every person and association of persons, and every company corporation or association, embraced within the provisions of this Act which shall fail to make the returns and statements, or any of them, herein provided, within the time herein limited, or which, after reasonable notice, shall fail to give any additional

evidence or to furnish any additional information required by the said State Tax Board, or by the said State Comptroller, by authority hereof, shall forfeit and pay to the State two hundred dollars ($200) for each and every day during which it shall continue in default, which shall be recovered by suit by the Attorney General of the State of Texas, and the venue of every such suit is hereby fixed within the County of Travis in said State and the courts of the said county are hereby vested with jurisdiction of the said causes.

SEC. 11. If the property of any individual, company, corporation or association shall be in the hands of any receiver, assignee, trustee in bankruptcy, or other person holding under any court or for the benefit of any creditor or creditors then the statements, reports, information, books and papers aforesaid shall be furnished by said receiver, assignee, trustee, or other person, or by some officer or agent acting under him, in the same manner and to the same extent as hereinbefore provided in cases where the individual or the company or association is in possession.

SEC. 12. That upon the taking effect of this Act, and upon compliance with its provisions by the individuals, companies, corporations and associations hereby affected, and upon the payment of the taxes imposed hereunder, if any are imposed, all laws and parts of laws laying taxes upon the gross receipts of said individuals, companies, corporations and associations shall be and the same are hereby repealed.

SEC. 13. That all laws and parts of laws in conflict herewith shall be and the same are hereby repealed.

Approved April 17, 1905.

Takes effect 90 days after adjournment.

"Exhibit C."

TAXES—PROVIDING FOR LEVYING AND COLLECTING TAXES UPON THE GROSS RECEIPTS OF CERTAIN INDIVIDUALS, FIRMS AND CORPORATIONS.

(H. B. No. 361.)

CHAPTER 148.

An Act providing for the levy and collection of a tax upon individuals, firms, joint stock associations, corporations and other persons owning, operating, managing or controlling for profit within this State the business of express companies, sleeping car, palace car and dining car companies, or either; telegraph companies, telephone companies; surety and guaranty companies; collecting and commercial agencies or either; gas, electric light, electric power and water work companies, or plants, or either; exchanges or dealing in futures in agricultural products, articles of commerce, corporation stocks, or other articles or commodities; wholesale dealers in coal oil, naptha, benzine, mineral oils refined from petroleum, or either, and any and all mineral oils; publishing, printing and selling school text books or law books, or either; companies owning, leasing or hiring any kind of cars to railroad companies, or other persons; pipe line companies, oil producers or oil producing companies, and all persons engaging in any of said businesses; providing penalties for the violations of the provisions of this Act, and repealing all laws in conflict herewith.

SECTION 1. *Be it enacted by the Legislature of the State of Texas:* Each and every express company shall, on or before the first day of March, 1906, and annually thereafter, through its superintendent or other chief officer, or authorized agent, file with the Comptroller a report, under oath, showing the amount of gross receipts from charges and freights within this State paid to or uncollected by such company on account of moneys, goods, merchandise or other character of freight carried within this State during the twelve months next preceding January the first of each year. Said express companies, at the time of filing the required report shall pay to the Treasurer of the State, an annual tax equal to two and one half per

cent on their gross receipts, as shown by said report. The receipt of the Treasurer of the State shall be evidence of the payment of such taxes. Should any person, association of persons, the officers or agents of any such person, association of persons, or corporations herein named, fail to make the report provided for in this Section for more than sixty days after the termination of any year, then he shall be deemed guilty of misdemeanor, and upon conviction shall be fined in any sum not less than fifty dollars nor more than one hundred dollars. Each day after said sixty days have expired shall be deemed a separate offense ; and in addition thereto in the event of the failure of the officers or agents of any such company or corporation to make such report, and pay said tax, for sixty days after the termination of any year, each and every such company or corporation so failing shall forfeit and pay to the State of Texas twenty-five dollars for each day said report and payment are delayed, which forfeiture shall be sued for by the Attorney General, in the name of the State. For the purpose of suits and prosecutions provided for herein, venue and jurisdiction are hereby conferred upon the courts of Travis county, and service may be had upon any officer or agent of such company or corporation within this State, and such service shall in all respects be held legal and valid. The tax herein provided for shall be in lieu of all other taxes now levied upon express companies, and not in addition thereto.

SEC. 2. Every sleeping car company, palace car company, or dining car company, doing business in this State, and every corporation, person or association of persons leasing or renting, owning controlling or managing any palace cars or dining or sleeping cars within this State, for the use of the public, and for which any fare is charged, shall pay an annual tax equal to four per cent of their gross receipts earned from any and all sources whatever within this State, except from receipts derived from buffet service. Said taxes herein provided for shall be paid to the State Treasurer quarterly for the use of the State. Every such company, association, person or corporation, so owning, controlling or managing any such dining car, palace car, or sleeping car, shall, on the first day of April of each year, and quarterly thereafter, report to the Comptroller, under oath of the president, treasurer, superintendent or some other officer of said corporation, or some agent thereof, duly authorized the gross amount of receipts earned from any and all sources whatever within this State, except from receipts derived from buffet service,

during the preceding quarter. Should any person, association of persons, the officers or agents of any such persons, association of persons, or corporation herein named, fail to make the report provided for in this Chapter, for more than thirty days after the termination of any quarter of the year, then he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty dollars nor more than one hundred dollars. Each day after said thirty days have expired shall be deemed a separate offense; and in addition thereto, in the event of the failure of the officers or agents of any such company or corporation to make such report, and pay said tax, for thirty days after the termination of any quarter of the year, each and every such company or corporation so failing shall forfeit and pay to the State of Texas twenty-five dollars for each day said report and payment are delayed which forfeiture shall be sued for by the Attorney General in the name of the State. For the purpose of suits and prosecutions provided for herein, venue and jurisdiction are hereby conferred upon the courts of Travis County, and service may be had upon any officer or agent of such company or corporation within this State, and such service shall in all receipts be held legal and valid. The tax herein provided for shall be in lieu of all other taxes now levied upon sleeping car, palace car, or dining car companies, except the tax of twenty-five cents on the one hundred dollars of the capital stock of said companies employed in this State, as provided by the Acts of the Twenty-third Legislature, Chapter 102.

Sec. 3. Each and every person, association of persons, firm, company or corporation owning, operating, managing or controlling any telegraphic line or lines in this State, for the transmission of telegraphic messages, and charging for the transmission of said messages, shall pay an annual tax of three per cent on their gross receipts from all sources within this State. Said taxes herein levied shall be paid to the State Treasurer quarterly. Every such person, association of persons, firm, company or corporation, so owning, controlling or managing any telegraph line or lines in this State shall, on or before the first day of April of each year and quarterly thereafter, report to the Comptroller of Public Accounts, under the oath of the president, treasurer, or superintendent of said company, association or corporation, or some officer or agent thereof, duly authorized, the amount received by them in the payment of telegraphic charges, including the amount received on full rate messages and half rate messages and from the lease of any wires, during the

preceding quarter. Should any person, association of persons, firm, company or corporation, or the officers or agents of any such person, association of persons, firm, company or corporation herein named, fail to make the report provided for in this Article, for thirty days after the termination of any quarter of the year, then he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty dollars, nor more than one hundred dollars. Each day after said thirty days have expired shall be deemed a separate offense. In addition thereto, in the event of the failure of the officer or agent of any such person, company or corporation, to make the report herein required, and pay said taxes for thirty days after the termination of any quarter of the year, each and every such person, company or corporation shall forfeit and pay to the State of Texas twenty-five dollars for each day said report and payment are delayed, which forfeiture and taxes shall be sued for by the Attorney General, in the name of the State. For the purpose of suits and prosecutions provided in this Article, venue and jurisdiction are hereby conferred upon the courts of Travis County, and service may be had upon any officer or agent of such person, firm, company or corporation in this State, and such service shall in all respects be held legal and valid. The tax provided for in this Article shall be in addition to all other taxes levied, except the present message tax of one cent on each full rate message, and one-half of one cent on each half rate message, which is levied by article 5049, Revised Statutes of 1895, and which is hereby repealed.

Sec. 4. Each and every person, association of persons, firm, company or corporation owning, operating, managing or controlling any telephone line or lines and telephones within this State, and charging for the use of the same, shall pay a tax of one and one-half per cent. upon their gross receipts within this State; provided, that no gross receipt tax shall be levied upon any person, firm, company, or corporation owning, managing or controlling any telephone line not operated for toll, revenue or hire. Said taxes herein levied shall be paid to the State Treasurer quarterly. Every such person, association of persons, firm, company or corporation so managing, owning or controlling any telephone line or lines, and telephones in this State, shall on the first day of April of each year, and quarterly thereafter, report to the Comptroller of Public Accounts, under the oath of the president, treasurer or superintendent of said company, association or cor-

poration, or some officer or agent thereof duly authorized, the amount received by them or it in the payment of charges for the use of its line or lines, telephone and telephones, during the preceding quarter. Should any person, association of persons, firm, company or corporation, or the officers or agents of such person, association of persons, firm, company or corporation herein named, fail to make the report provided for in this Article, for thirty days after the termination of any quarter of the year, then he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty dollars, nor more than one hundred dollars. Each day after said thirty days have expired shall be deemed a separate offense. In addition thereto, in the event of the failure of the officer or agent of any such person, firm, company, or corporation to make the report herein required, and pay said taxes for thirty days after the termination of any quarter of the year, each and every such person, company or corporation shall forfeit and pay to the State of Texas twenty-five dollars for each day said report and payment are delayed, which forfeiture and taxes shall be sued for by the Attorney General, in the name of the State. For the purpose of suits and prosecutions provided for in this Article, venue and jurisdiction are hereby conferred upon the courts of Travis county, and service may be had upon any officer or agent of such person, firm, company or corporation in this State, and such service shall in all respects be held legal and valid; provided, that where telephone companies have previously paid the State tax for 1905, of twenty-five cents on each telephone in use, levied under Article 5243*f*, of the Revised Statutes of 1895, the amount so fixed in advance of the date when this Act takes effect, shall be deducted from the amount shown to be due from the tax of one and one-half per cent on gross receipts imposed by this Act. The tax provided for in this Article shall be in addition to all other taxes levied by law, except that levied by Article 5049 and 5243*f*, of the Revised Civil Statutes of 1895, which are hereby repealed.

SEC. 5. Every surety and guaranty company, at the time of filing its annual statement shall report to the Commissioner of Insurance its gross premium receipts in the State during the preceding year, and shall pay an annual tax of two per cent on its gross receipts from fees or charges collected. Upon receipt by him of sworn statements showing the gross premium receipts by such companies, the Commission shall certify to the State Treasurer the amount of tax

due by each Company, which tax shall be paid to the State Treasurer on or before the first day of March, following, whose receipt shall be evidence of the payment of such taxes. No such company shall receive a permit to continue to do business in this State until such taxes are paid. The tax provided for in this Article shall be in addition to all other taxes levied by law.

SEC. 6. Each and every person, firm, corporation or association of persons owning, operating or controlling any collecting agency or commercial agency in this State, and charging for collections made or business done, shall pay to the State Treasurer an annual tax of one-half of one per cent upon their gross receipts for the use and benefit of the State. This tax shall be in addition to all other taxes levied and said taxes shall be paid to the State Treasurer quarterly. Every such person, firm, corporation or association of persons so owning, controlling or managing any commercial agency or collecting agency shall, on or before the first day of April, and quarterly thereafter, report to the Comptroller of Public Accounts, under oath of the president, treasurer or superintendent of said co pany, association of persons, person or corporation, or some other officer or agent thereof duly authorized, the amount received by them or it in the payment of charges for collections made and business done for the quarter next preceding. Should any person, association of persons, firm, company or corporation, or the officers or agent thereof, herein named, fail to make the report provided for in this Article, for thirty days after the termination of any quarter of the year, then he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty dollars nor more than one hundred dollars. Each day after the said thirty days have expired shall be deemed a separate offense. In addition thereto, in the event of the failure of the officer or agent of any such person, company or corporation to make the report herein required and pay said taxes for thirty days after the termination of any quarter of the year, each and every such person, company or corporation shall forfeit and pay to the State twenty-five dollars for each day said report and payment are delayed, which forfeiture and taxes shall be sued for by the Attorney General, in the name of the State. For the purpose of suits provided for in this Article, venue and jurisdiction are hereby expressly conferred upon the courts of Travis County, and service may be had upon any officer or agent of any such person, company or corpora-

tion within this State, and such service shall in all respects be held legal and valid.

SEC. 7. Each and every person, firm, corporation or association of persons owning, operating or controlling any gas, electric light or electric power plant or water works plant in this State, and charging for gas, electric light, electric power or water, shall pay to the State Treasurer an annual tax of one-fourth of one per cent upon their gross receipts for the use and benefit of the State. This tax shall be in addition to all other taxes levied, and said taxes shall be paid to the State Treasurer quarterly. Every such person, firm, corporation or association of persons so owning, controlling or managing any gas or electric light plant or electric power plant, or water works plant shall on or before the first day of April, and quarterly thereafter, report to the Comptroller of Public Accounts, under oath of the president, treasurer or superintendent of said company, association of persons, person or corporation, or some other officer or agent thereof, duly authorized, the amount received by them or it in the payment of charges for gas or electric lights, or electric power or water, for the quarter next preceding. Should any person, association of persons, firm, company, or corporation, or the officers or agents thereof herein named fail to make the report provided for in this Article, for thirty days after the termination of any quarter of the year, then he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty dollars, nor more than one hundred dollars. Each day after said thirty days have expired shall be deemed a separate offense. In addition thereto, in the event of the failure of the officer or agent of any such person, company or corporation to make the report herein required, and pay said taxes within thirty days after the termination of any quarter of the year, each and every such person, company or corporation shall forfeit and pay to the State twenty-five dollars for each day said report and payment are delayed, which forfeiture and taxes shall be sued for by the Attorney General, in the name of the State. For the purpose of suits provided for in this Article, venue and jurisdiction are hereby expressly conferred upon the courts of Travis county, and service may be had upon any officer or agent of any such person, company or corporation within this State, and such service shall in all respects be held legal and valid.

SEC. 8. Each and every person, firm, association of persons, corporation, domestic and foreign, who shall directly or indirectly, or

as agent for another, or through any agent or agents, carry on, manage, superintend, or transact any business commonly known as exchanges, or dealing in futures, in any agricultural products, articles of commerce, corporation stocks, or any other article or commodity, or where orders are taken and booked to be accepted and consummated by another where there exists the *bona fide* intention to deliver, shall, on or before the first day of April of each year and quarterly thereafter, file with the Comptroller of Public Accounts a report in writing under oath showing the amount of gross receipts from the management of any such business from all sources for the preceding three months, and shall pay a tax of one and one-quarter (1¼) per cent on their gross receipts from all sources. Said tax herein levied shall be paid to the State Treasurer quarterly, that is to say, on the first days of April, July, October and January of each year, provided that this article shall not apply to merchandise brokers and commission merchants. If any such person, or the manager or managers of any such business for any firm, association of persons, or corporation, shall fail to make the report, and pay the tax as above provided for, thirty days after the termination of any quarter of the year, each and every such person, firm, association of persons, or corporation, shall when so failing, forfeit and pay to the State twenty-five ($25.00) dollars for each day said report and payment are delayed, which forfeiture and tax shall be sued for by the Attorney General in the name of the State, and venue is hereby given in any court of competent jurisdiction in Travis County. The tax here provided shall be in addition to all other taxes levied by law.

SEC. 9. Each and every person, association of persons or corporation created by the law of this or any other State or nation, which shall engage in their own name, or in the name of others, or in the name of their representatives or agents, in this State, in the wholesale business of coal oil, naptha, benzine or any other mineral oils refined from petroleum, and any and all mineral oils, shall pay an annual tax of two per cent upon their gross receipts from any and all sales in this State of any of said articles in section 9 of this Act hereinabove mentioned, and an annual tax of two per cent of the cash market value of any and all of said articles that may be received or possessed or handled or disposed of in any manner other than by sale in this State; and it is hereby expressly provided that delivery to or possession by any person, association of persons or corporation in this State of any of the articles herein-

above mentioned in section 9 of this Act, from whatever source the same may have been received, shall for the purpose of this act be held and considered such a sale and such ownership and possession of such articles and property (where no sale is made) as will and shall subject the same to the tax herein provided for. Said tax herein provided for shall be paid to the State Treasurer quarterly, and every such person, agent, association of persons, or corporation so owning, controlling or managing such business shall on or before the first day of April, and quarterly thereafter, report to the Comptroller under oath of the president, treasurer, superintendent or some other officer of said corporation or association, or some duly authorized agent thereof, the amount received by them from such business in this State. Should any person, association of persons or corporation, or the officers or agents of any such corporation, person or association of persons herein named, fail to make the report herein provided for, and pay said taxes for thirty days after the termination of any quarter of the year, then he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty, nor more than one hundred dollars. Each and every day after said thirty days have expired shall be deemed a separate offense. In addition thereto, in the event of the failure of the officers or agents of any such company or corporation to make the reports and pay such taxes, for thirty days after the termination of any quarter of the year, each and every such company or corporation, or their officers or agents so failing, shall forfeit and pay to the State the sum of twenty-five dollars for each day said report and payment are delayed, which forfeiture and taxes shall be sued for by the Attorney General in the name of the State. For the purpose of suits and prosecutions provided for in this Article, venue and jurisdiction are hereby expressly conferred upon the courts of Travis County, and service may be had upon any officer or agent of such company or corporation in the State, and such service shall in all respects be held legal and valid. The tax herein levied shall be in addition to all other taxes levied by law.

SEC. 10. Every person, firm, joint stock association, company, corporation, or association of persons, whether incorporated under the laws of this State or any other State or nation, or whether incorporated at all or not, engaged in publishing, printing and selling text books used in the schools of this State, or law books of any character, or any such person, firm, joint stock association,

company, corporation or association of persons owning, controlling or managing any such business as text book or law book publishers within this State or out of it, and having State agencies in this State for the purpose of selling any book or books to be used in any of the schools in this State shall pay a tax of one per cent on their gross receipts from such business in this State. This tax shall be paid to the State Treasurer quarterly. Every such person, firm, joint stock association, company, corporation or association of persons so owning, controlling or managing any such business as text books or law book publishers, or having State agencies in this State, shall on or before the first day of April, and quarterly thereafter, of each year, report to the Comptroller of Public Accounts, under the oath of the person owning or operating said agency, or of the president, treasurer, superintendent, or some other responsible officer of such firm, company, joint stock association, or corporation, the amount received by them from such business for and during the preceding quarter of the year. Should any person, association of persons, firm, company or corporation, or the officer or agent thereof herein named fail to make the report provided for in this Article, for thirty days after the termination of any quarter of the year, then he shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than fifty dollars nor more than one hundred dollars, and each day after said thirty days have expired shall be deemed a separate offense. And in addition thereto, in the event of the failure of the officer or agent of any such person or corporation to make the report herein required, and pay the said taxes, for thirty days after the termination of any quarter of the year, each and every such person, company or corporation so failing shall forfeit and pay to the State twenty-five dollars for each day said report and payment are delayed, which forfeiture and taxes shall be sued for by the Attorney General in the name of the State. For the purpose of suits and prosecutions provided for in this Article, venue and jurisdiction are hereby expressly conferred upon the courts of Travis county, and service may be had upon any officer or agent of such person, company or corporation within this State, and such service shall in all respects be held legal and valid.

SEC. 11. Every person, firm, joint stock association or corporation owning stock cars, refrigerator and fruit cars of any kind, tank cars of any kind, coal cars of any kind, furniture cars, or common box and flat cars, and leasing, renting, operating, hiring or charging

mileage for the use of such cars, shall on or before the first day of April, and quarterly thereafter, through its superintendent or other chief officer, or authorized agent, file with the Comptroller of Public Accounts a report under oath, showing the amount of gross receipts from such rentals or mileage, or other sources of revenue for the preceding three months, and shall pay a tax of two per cent. on their gross receipts from all rentals or mileage or other sources of revenue received from any railway companies or other persons or from all other sources within this State; provided this shall not apply to the mileage and per diem paid by one railway company to another railway company within this State for the use of such cars. Said tax herein levied shall be paid to the State Treasurer quarterly. If any person, firm, joint stock association or corporation shall fail to make the report and pay the tax as above provided, for thirty days after the termination of any quarter of the year, each and every such person, firm, joint stock association or corporation so failing shall forfeit and pay to the State twenty-five dollars for each day said report and payment are delayed, which forfeiture and tax shall be sued for by the Attorney General, in the name of the State. And it is hereby provided that the cars or property of any such person, firm, joint stock association or corporation shall be subject to seizure and sale whenever found in this State, to pay the taxes, penalties and costs that may accrue under this Article; provided, that upon the request of the Comptroller each railroad company in the State of Texas shall forthwith and within not more than thirty (30) days after such request shall have been made, report to said Comptroller under oath the amounts paid by it for the use of the cars of the kind mentioned in this section within such period as the Comptroller shall have fixed and to what companies, associations or individuals the same was paid and the amount paid to each and the dates and particulars of such payments, and if any railroad shall fail to make any report as herein provided it shall forfeit and pay to the State twenty-five (25) dollars for each and every day during which said report is delayed, which shall be sued for by the Attorney General in the name of the State. For the purpose of suits provided for herein, venue and jurisdiction are hereby expressly conferred upon the Courts of Travis County, and service may be had upon any officer or agent of any such person, firm, company or corporation within this state, and if no officer or agent can be found within this State, service may be had by citation

by publication, and such service shall in all respects be held legal and valid. The tax provided for in this Article shall be in addition to all other taxes levied by law.

SEC. 12. Every individual, joint stock association, company, co-partnership or corporation, whether incorporated under the laws of this state or of any other State, Territory, or of the United States or of any foreign nation, which owns or operates a pipe line or lines within the State of Texas, whether such pipe lines be used for the transmission of oil, natural or artificial gas whether the same be for illuminating or fuel purposes or for any other purpose, or for steam, for heat or power, or for the transmission of articles by pneumatic or other power, shall be deemed and held to be a pipe line company; and every such pipe line company shall, on or before the first day of April of each and every year, and quarterly thereafter, through its Superintendent, president, secretary or other authorized agent, file with the Comptroller a report under oath, showing the amount of gross receipts from charges and freights within this State, paid to or uncollected by, such pipe line company on account of any business transacted by it in the capacity of a pipe line company as herein defined, during the three months next preceding; and each pipe line company engaged in conveying oil shall report as a part of its gross receipts such sum as it would have been compelled to pay for conveying oil owned by it and conveyed for itself, if it had employed some other pipe line company to convey it. Said pipe line companies, at the time of filing the required report, shall pay to the Treasurer of the State of Texas two per cent on the gross receipts, as shown by said reports. The receipt of the Treasurer of the State shall be evidence of the payment of such taxes. Should any person, association of persons, the officers or agents of any such person, association of persons or corporation herein named, fail to make the report provided for in this Section for more than thirty days after the termination of any quarter of the year, then he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty dollars, nor more than one hundred dollars. Each day after said thirty days have expired shall be deemed a separate offense; and in addition thereto, in the event of the failure of the officers or agents of any such company or corporation to make such report and pay said tax for thirty days after the determination of any quarter of the year, each and every such company or corporation so failing shall forfeit and pay to the State of Texas

twenty-five dollars for each day said report and payment are delayed, which forfeiture shall be sued for by the Attorney General, in the name of the State. For the purpose of suits and prosecutions provided for herein, venue and jurisdiction are hereby conferred upon the courts of Travis county, and service may be had upon any officer or agent of such company or corporation within this State, and such service shall in all respects be held legal and valid. The tax provided for in this Article shall be in addition to all other taxes levied, but the provisions of this section shall not be construed to levy an additional tax on gas companies, as provided for elsewhere in this Act.

SEC. 13. Every individual, joint stock company, co-partnership or corporation, whether incorporated under the laws of this State or any State or Territory of the United States or of any foreign country, which owns, controls, manages or leases any oil well within this State, shall on or before the first day of April of each and every year, and quarterly thereafter, through its superintendent, president, secretary or other authorized agent, or in person or by agent (if said well belongs to or is managed or controlled by any individual), file with the Comptroller a report under oath, showing the total amount of all oil produced by each of said parties, during said next preceding quarter, and also its market value. Said oil well companies or individuals owning, controlling or managing oil wells, at the time of filing the required report, shall pay to the Treasurer of the State of Texas, one per cent on the gross products as shown by said reports, said amount in money to be fixed at the average market value of said products during the preceding quarter. The receipt of the Treasurer of the State shall be evidence of the payment of such taxes. Should any person, association of persons, the officers or agents of any such persons, association of persons or corporations herein named, fail to make the report provided for in this chapter, for more than thirty days after the termination of any quarter of the year, then he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty dollars, nor more than one hundred dollars. Each day after said thirty days have expired shall be deemed a separate offense. And in addition thereto, in the event of the failure of the officers or agents of any such company or corporation, to make such report and pay said tax for thirty days after the termination of any quarter of the year, each and every such company or corporation so failing shall forfeit and

pay to the State of Texas twenty-five dollars for each day said report and payment are delayed, which forfeiture shall be sued for by the Attorney General, in the name of the State. For the purpose of suits and prosecutions provided for herein, venue and jurisdiction are hereby conferred upon the courts of Travis county, and service may be had upon any officer or agent of such company or corporation within this State, and such service shall in all respects be held legal and valid. The tax provided for in this Article shall be in addition to all other taxes levied.

SEC. 14. Except as herein stated, all taxes levied by this Act shall be in addition to all other taxes now levied by law; provided, that nothing herein shall be construed as authorizing any county or city to levy an occupation tax on the business taxed by this Act.

SEC. 15. If for any reason the Comptroller of Public Accounts is not satisfied with any report required to be made herein, he may require a further supplemental report from any such person, corporation, copartnership or association, containing information and data upon such matters as he may need or deem necessary to ascertain the true and correct amount of all taxes due by any such person, firm or corporation. Every statement or report required by this Act shall have affixed thereto the affidavit of the president, vice president, secretary or treasurer of the person, corporation, copartnership or association, or one of the persons or members of the partnership making the same, to the effect that the statement is true. The Comptroller shall prepare blanks to be used in making reports required by this Act.

SEC. 16. If the Comptroller has any reason to believe, or does believe, that any person, firm or corporation, subject to the provisions of this Act has made any false return, or has failed or omitted to make a full return, then the Comptroller, or some person acting for him, shall file an affidavit with the district clerk of Travis county, or with any district judge of Travis county, in vacation, setting forth his belief that such person, firm or corporation, to be named in the affidavit, has unlawfully omitted from a certain specified tax return, a true and full statement, and that such person, firm or corporation, or some other person, firm or corporation to be named in the affidavit, has in his or its possession certain specified books or papers containing evidence tending to show such unlawful omission. Upon the filing of such affidavit a writ shall issue forthwith, and be served by any proper officer, requiring the person, firm or corporation having possession of such books or papers to permit

OOR COPY

State of Texas, or so much thereof as may be specially named in such writ, and being only such books and papers or so much thereof as may contain the evidence tending to show the unlawful omission complained of in said affidavit, and the court or the judge thereof in vacation, issuing such writ shall for the purpose of enforcing obedience thereto possess and exercise all the powers usually possessed and exercised by it or him in contempt proceedings. All costs incurred on account of the filing of any affidavit of the issuance of the writ thereon and of the service of such writ, shall be charged against the State of Texas; provided, however if as a result of such proceedings it is found that such designated person, firm or corporation has unlawfully omitted from the report required herein any statement or statements, then the State shall recover the costs from such person, firm or corporation.

SEC. 17. All laws and parts of laws in conflict with the provisions of this Act are hereby repealed.

SEC. 18. There now being a deficit in the public revenues of the State, an imperative public necessity and an emergency exists requiring that the constitutional rule requiring all bills to be read on three several days be suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

(NOTE. -The enrolled bill shows that the foregoing act passed the House of Repre entatives by a two-thirds vote, yeas 91, nays 9; it was referred to . ie Senate where it was amended and passed by a two-thirds vote, yeas 27, nays 0. The House of Representatives refused to concur in the Senate amendments and asked for a free conference committee; the report of the free conference committee was adopted by the House of Representatives by a two-thirds vote, yeas 94, nays 6; and the report of the free conference committee was adopted by the Senate by a two-thirds vote, yeas 28, nays 1.)

Approved April 17, 1905.

Became a law April 17, 1905.

FILED.
APR 8 1908
JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 207.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY, ET AL.,
Plaintiffs in Error,

against

THE STATE OF TEXAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

Notes of Argument for Plaintiffs in Error.

HIRAM M. GARWOOD,
MAXWELL EVARTS,
Of Counsel for Plaintiffs in Error.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 207.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY, et al.,
Plaintiffs in Error,

AGAINST

THE STATE OF TEXAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

NOTES OF ARGUMENT FOR PLAINTIFFS IN ERROR.

Statement.

In April, 1905, the Legislature of the State of Texas passed an act the short title of which is "Railroads—Providing for the Levy, Assessment and Collection of a Tax on the Gross Receipts of."

In the first section of the Act, it was provided that every railroad owning, operating, managing or controlling any line of railroad in the State

of Texas for the transportation of passengers, freight or baggage "shall pay to the State an annual tax for the year 1905 and for each calendar year thereafter, *equal to one per cent. of its gross receipts*, if such line of railroad lies wholly within the State of Texas." The Galveston, Harrisburg & San Antonio Railway Company lies entirely within the State of Texas.

In the second section of the Act, it is provided that a report of the gross receipts shall be made by the railroad under oath to the Comptroller of Public Accounts, and shall state the gross receipts of the railroad "from every source whatever."

In pursuance of the provisions of this act, the Galveston, Harrisburg and San Antonio Railway Company filed on the 26th day of September, 1905, a report in writing under oath with the Comptroller of Public Accounts of the State of Texas, showing the gross receipts of the railroad from every source whatever for the year ending June 30, 1905, to be $7,472,458.47, on which the tax under this Act was assessed by the Comptroller of Public Accounts at $74,724.50. The Railroad Company refused to pay the tax, and on November 24, 1905, the Attorney General for the State of Texas at the request of the Comp-

troller of Public Accounts filed a petition in behalf of the State of Texas in the District Court of Travis County praying for a judgment against the Galveston, Harrisburg and San Antonio Railway Company for the amount of the tax and a ten per cent. penalty (Record, p. 1). There were a number of other railroads mentioned in the petition as defendants; but as the case is the same as to each of them we shall for convenience refer only to the Galveston, Harrisburg and San Antonio Railway Company.

To this petition the Railroad Company filed an answer, setting up the fact that of its total gross receipts $5,290,389.79 were from interstate traffic—$1,578,755.11 from intra-state traffic and $684,324.42 from such sources that it was impossible to apportion them as coming either from interstate or intra-state traffic, and claiming that because a portion of its gross receipts was from interstate traffic the tax thereon was therefore in violation of Section 8 of Article I. of the Constitution of the United States which gives Congress the power;

> "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The case was tried and the trial court sustained the law and held that it was not in violation of the provision of the Federal Constitution just quoted (Record, p. 40).

An appeal was taken to the Court of Civil Appeals, which reversed the judgment of the court below, and held that the act in question was in violation of the commerce clause of the Federal Constitution (Record, p. 59).

From the judgment in favor of the railroad company, the State of Texas took an appeal to the Supreme Court of Texas, which reversed the decision of the Court of Civil Appeals and held that the act was constitutional.

The Railroad Company thereupon brought the case to this Court under the provisions of Section 709 of the Revised Statutes of the United States.

Specifications of Error.

The Court below erred:

First. In not affirming the judgment of the Court of Civil Appeals.

Second. In reversing the judgment of the Court of Civil Appeals.

Third. In holding that the act of the Legislature of the State of Texas, approved April 17,

1905, providing for a tax on the gross receipts of railroads was not in violation of Section 8, Article I. of the Federal Constitution, giving Congress power to regulate commerce among the several States.

Fourth. In holding that the tax imposed by the said act of the Legislature of the State of Texas was an occupation tax.

ARGUMENT.

FIRST POINT.

The case at bar is in all essential respects identical with the decision of this Court, in the case of Philadelphia Steamship Company v. Pennsylvania, 122 U. S. 326, and is in no way controlled by the subsequent decision of Maine v. Grand Trunk Railroad, 142 U. S. 217.

Before taking up the discussion of the two cases just cited, it may be well to fully understand the course in the Legislature of the Texas statute under consideration.

The Court below held that this act imposed an occupation tax, but an examination of the history of this bill from the time of its introduction in the House until it finally became a law will show that there is no ground whatever for the claim

that the tax imposed thereby is an occupation tax. The bill as originally introduced had the following title:

> "An act imposing an *occupation* tax upon persons, firms, companies or corporations owning, operating, managing or controlling any line of railroad in this State for the transportation of passengers and freight equal to one and one-half per cent. of their gross receipts *within this State*, and repealing subdivision 42, Article 5049 Revised Statutes of Texas of 1895."

The bill, as introduced, also limited the imposition of any tax to the gross receipts of the railroad within the State.

Immediately upon its introduction, the bill was referred to the House Committee on Revenue and Taxation, and was reported back to the House by that Committee with two amendments. (1) The striking out of all after the enacting clause, and inserting in lieu thereof, the bill substantially as it was passed; and (2) the amending of the title by striking out the words "occupation tax" and "within this State". (House Journal of the 29th Texas Legislature, p. 379).

These amendments of the Committee were

adopted by the House, and the bill finally became a law practically as amended by the House Committee on Revenue and Taxation.

While the bill as introduced may have been intended to impose an occupation tax, yet it would seem that such intention was abandoned when the act came from the Committee on Revenue and Taxation. No other conclusion can fairly be drawn from the action of the Committee in striking out the words in the title indicating that the act was for the purpose of imposing an occupation tax and in striking out the entire body of the act, which as originally drawn provided for a tax on the business done in the State, and substituting an entirely new bill therefor. This conclusion is to the ordinary mind inevitable, and the Secretary of State of Texas whose duty it is to publish the session laws seems to have adopted it. When required to select a short title to the act, it never occurred to him to describe it as an occupation tax, but simply as a tax upon the gross receipts of railroads. The description of the act in the Session Laws of Texas is as follows:

> "Railroads—providing for the Levy, Assessments and Collection of a Tax on the Gross Receipts of."

Now, when the same Secretary of State was selecting a short title for a bill passed by the same Legislature imposing an occupation tax, he didn't describe it in any such roundabout way, but simply,

> "Taxes—Imposing Occupation Tax on Persons Dealing in Unearned Wages of Another." (Laws of Texas, 1905, p. 217.)

It is difficult to find an act of the Texas Legislature imposing an occupation tax which does not so describe the tax in the title of the bill. At the same session of the Legislature at which the bill under discussion was enacted, an occupation tax was imposed upon persons engaged in certain business, and in the title of that Act the tax was described as an occupation tax. The title reads as follows:

> "An Act imposing an annual occupation tax upon persons engaged in the business of purchasing or procuring assignments or transfers of wages not earned or not due." (Laws of Texas, 1905, p. 217).

The majority of, if not all, prior acts in preceding legislatures in Texas imposing an occupation tax so describe the tax in the title of the Act.

This bill, imposing a tax on the gross receipts of railroads, was referred to by the Legislature in a subsequent act (Laws of Texas, 1905, p. 351). Instead of mentioning the bill involved in this case as a bill imposing an occupation tax, the subsequent law refers to it as one imposing a tax upon the gross receipts of railroads. Section 12 of the later act is as follows:

> "SEC. 12. That upon the taking effect of this Act and upon compliance with its provisions by the individuals, companies, corporations and associations, hereby affected, and upon the payment of the taxes imposed hereunder if any are imposed, *all laws and parts of laws laying taxes upon the gross receipts* of said individuals, companies, corporations and associations shall be and the same are hereby repealed."

Now, if the Legislature had intended the tax imposed by the act in controversy as an occupation tax, it would seem that it naturally would have so described it when referring to it in this subsequent Act, instead of calling it a law "laying taxes upon the gross receipts" of railroads.

Another reason why the tax imposed by this Act cannot be deemed an occupation tax is that

it appears by a stipulation in the case that the railroads have already paid what is practically equivalent to an occupation tax. This stipulation is found at page 57 of the Record, and the particular section referred to, is on page 58, as follows:

> "That each of the companies mentioned in the certificate of the Secretary of State of the State of Texas hereto annexed and marked 'Exhibit A,' and made a part hereof, has paid the franchise tax imposed upon it by an Act of the Legislature approved March 1, 1905, as the same appears in the Acts of the 29th Legislature, Chapter 19, page 21, the amounts paid by the several companies being shown in each certificate."

While the word "occupation" is not used in the Act, referred to in the stipulation just quoted, yet it speaks of corporations "authorized to do business in this State," and the "right to do business," of those corporations which do not pay the tax within a prescribed time is forfeited. It is not plain that there is any difference between an occupation tax and a tax to be paid in order that a corporation may acquire the right to do business in the State.

Certainly the combination of facts which we find in this case is most persuasive that the legislature of Texas never supposed that the tax which it was imposing by the gross receipts bill was an occupation tax. The amendment of the bill as originally introduced striking out the word "occupation" and the words "within this State," the reference to the bill in a subsequent act as a law "laying taxes upon the gross receipts," the similar construction placed upon the bill by another department of the State Government, and the payment by the Company under another act of a franchise tax for doing business in the State, almost compel one to the conclusion that the law did not impose a tax upon the occupation or business of railroading, but simply upon the gross receipts derived from the business. Certainly the law does not undertake to describe the business or occupation, the doing of which by the railroad it was supposed to tax.

Now as against these arguments showing that the tax under consideration was not an occupation tax what is to be said. It is claimed that the words describing the annual tax on railroads as "equal to one per cent. of its gross receipts"

indicate that the tax was not upon the gross receipts but was to be measured by them, and that, therefore, the tax was necessarily an occupation tax. The whole argument of the other side rests upon the words "equal to." If instead of these words, the word "of" had been used, then there would have been nothing to support the contention of the State.

Is there very much difference between the word "of" and the words "equal to" as used in this act? Are they not practically the same? It requires a very keen and acute mind to see the distinction between the levy of a tax of ten dollars and the levy of a tax equal to ten dollars, and as it seems to us, taking into consideration the context, the words are synonymous. The whole theory of the State that this is an occupation tax is necessarily derived from the words "equal to." There is nothing else in the act from which this conclusion can be drawn, so by a process of elimination we are forced to argue that it must be on these words that the other side rely.

It is very certain that the words "equal to" in no way indicate in themselves the imposition of an occupation tax. The old act of Texas of

1889, imposing occupation taxes contains no such words. After providing "that there shall be levied on and collected from every person, firm, company or association of persons, pursuing any of the following named occupations an annual occupation tax," the statute then described various occupations and imposed taxes for each. The statute is half a dozen pages long and mentions every conceivable occupation. Not once does it use the words "equal to," and when it comes to the occupation tax on railroads it says:

> "From every person, firm or association of persons owning or running any railroad cars * * * in this State, there shall be collected quarterly * * * a tax of * * * one per cent. on railroads upon their gross receipts from all their passenger travel within this State."

Not a word about collecting a tax "equal to" one per cent. of the gross receipts with the idea of measuring the tax, but a tax is imposed "of" one per cent. of the gross receipts, which word "of" we say is the same as "equal to" in the present case. We refer so in detail to this original occupation tax law of Texas for the purpose

of showing that the words "equal to" have in our opinion no bearing whatever upon the question whether an occupation tax is imposed or not. As we have shown, they are in no sense words peculiar to an occupation tax, and as used are synonymous with the word "of," meaning no more and no less.

An examination of the contemporaneous legislation to be found in chapter 148 of the General Laws of Texas, 1905, which is styled "Taxes—Providing for Levying and Collecting Taxes upon the Gross Receipts of certain Individuals, Firms and Corporations," will be found most instructive upon the question of what the Legislature meant by the words "equal to" in the Act involved in the case at bar. We insist that these words were not for the measuring or ascertaining the tax, but were equivalent to the word "of." Chapter 148 provides for a tax upon the gross receipts of many different kinds of corporations. In the first section Express Companies are referred to, and they are required to pay "an annual tax *equal to* 2½ per cent. on their gross receipts."

The next section relates to Sleeping Car Companies, and the tax there is required to be "*equal to* 4 per cent. of their gross receipts."

The following section relates to Telegraph Companies, and they are required to pay "an annual tax *of* [instead of 'equal to'] 3 per cent. on their gross receipts."

The next section relates to Telephone Companies, and under its provisions they are required to pay "a tax *of* [instead of 'equal to'] 1½ per cent. upon their gross receipts."

All of the other companies mentioned in this Act, and there are nine other sections covering different kinds of corporations, are required to pay an annual tax of a certain per cent. upon their gross receipts, and not a tax "equal to" a certain per cent. That is to say, the words "equal to" are used by the Legislature in this chapter 148 as synonymous with the word "of." There is absolutely no difference in the kind of taxes imposed by this Act, and the words "equal to," used in the first two sections, meant no more than the word "of," when used in the other sections with reference to the tax. In other words, the words in the third section, requiring Telegraph Companies to "pay an annual tax *of* 3 per cent. on their gross receipts" does not prescribe any different kind of tax than the words in the first two sections, requiring the companies therein

referred to to "pay an annual tax 'equal to' per cent. of their gross receipts."

In the case of State Tax on Railway Gross Receipts, 15 Wall. 284, the law of Pennsylvania imposed a tax upon railroads requiring them to "pay to the Commonwealth a tax of ¾ of one per centum upon the gross receipts of said company." By a divided court of five to three, the judgment of the court below holding the statute constitutional was affirmed by this court. As it originally stood, this case was an authority against the plaintiffs in error, but it was subsequently overruled by the case of Philadelphia Steamship Company v. Pennsylvania, 122 U. S. 326, 342, and so became an authority in their favor. That is to say, this court afterwards came to the conclusion that the case was wrongly decided and that the statute of Pennsylvania under consideration in the case of the State Tax on Railway Gross Receipts was unconstitutional.

The great importance of this case in the present discussion is that although the statute of Pennsylvania does not contain the exact language of the Texas act, yet this Court in the course of its opinion in speaking of the Pennsylvania statute and as to the tax it imposed used precisely the

same language that is found in the act of the Texas legislature now under consideration.

The Pennsylvania statute imposed a tax "of one per centum upon the gross receipts" (p. 284).

At page 296, of the opinion of Judge STRONG, he said:

> "Influenced by these considerations we hold that the Legislature of the State imposing a tax upon plaintiffs in error *equal to* ¾ *of one per cent. of their gross receipts* is not invalid because in conflict with the power of Congress to regulate commerce among the States."

The tax imposed by the statute now being considered is a tax "*equal to* one per centum *of* its gross receipts."

We urge upon the Court that the language used by Judge STRONG in describing the tax then being considered by the Court is precisely the same as the language used by the Texas Legislature, showing that this Court has already construed the words "equal to" used in such an act as equivalent to the word "of," which was the actual word used in the Pennsylvania statute; and the words "of their gross receipts" to be

precisely the same as the words "upon the gross receipts," used in the Pennsylvania bill.

In other words, this Court has already passed upon an act which it held to provide precisely what is covered by the words of the act in the case at bar, and though originally this Court held such act to be constitutional, yet the decision is now to be considered in the light of the subsequent decision of this Court overruling the Pennsylvania case, and the State Tax case stands as an authority of this Court holding that an act worded like the Texas Act is unconstitutional because in conflict with the commerce clause of the federal constitution.

We therefore urge upon the court this—that there never yet was an occupation tax imposed by the Legislature of the State of Texas which was not so designated as an occupation tax, and which did not describe the business, for the doing of which the tax was imposed, and we strongly insist that it cannot be claimed that such a tax is imposed simply because the words "equal to" are used in describing the tax. That is to say, where a statute says that a railroad shall pay an annual tax equal to one per cent. of its gross receipts, there is no more reason

for saying that such tax is an occupation tax, than if the act had provided that the railroad should pay an annual tax of one per cent. of its gross receipts, and in neither case is there ground for deeming it an occupation tax, when not so specifically declared in the bill, when no attempt is made to describe in the bill any occupation to be taxed, when an occupation or franchise tax is required to be and has been paid under another act and when the legislature amended the bill as originally introduced by striking out the word "occupation" and the words "within the State."

If we are right in our position that this is not an occupation tax, then it would seem to follow that inasmuch as the gross earnings of the railroads are in part derived from interstate commerce, the tax is void because in violation of the commerce clause of the federal constitution. This was conceded by the court below, where it was said:

> "If the statute under consideration were held to levy a tax upon the gross earnings of the railroads it would be a tax upon the proceeds of interstate commerce, therefore it would be void, because in conflict with Article I, Section 8, Subdivision 4, of the

Constitution of the United States." (Record, p. 243.)

In the case of Philadelphia Steamship Co. v. Pennsylvania, 122 U.S. 326, the act of the Legislature therein involved provided as follows:

> "That every railroad company, canal company, steamship company, slack water navigation company, transportation company * * * now or hereafter incorporated by or under any law of this commonwealth, or now or hereafter incorporated by any other State, and doing business in this commonwealth * * * and owning, operating or leasing * * * any railroad or other device for the transportation of freight or passengers * * * or in any way engaged in the business of transporting freight or passengers * * * shall pay to the State Treasurer for the use of the commonwealth a tax of 8/10 of 1% upon the gross receipts of said company for tolls and transportation."

If the Texas law we are considering imposed an occupation tax then certainly the Pennsylvania law just quoted must have done so also. The only difference between the two laws is that the Texas law declares that the railroad shall

pay an annual tax "equal to" one per cent., whereas the Pennsylvania law declares that the railroad or steamship company shall pay a tax "of" 8/10 of one per cent., and as you read the opinion in the Pennsylvania case, it is very difficult to believe that the result would have been any different, if the statute had read "a tax *equal to* 8/10 of one per cent." This is substantially the only difference between the two acts, and as we have shown by our reference to the State Tax Case, 15 Wall, 284, such difference in words is not considered a difference in meaning by this Court.

In the Pennsylvania case, it appeared that the gross receipts of the Company were received by the defendants from interstate commerce and foreign commerce. At the trial of the case the jury was dispensed with and the Court gave judgment for the State for the amount of the tax. Exceptions were taken upon the ground that the judgment was in conflict with the commerce clause of the Federal Constitution. The case was taken to the Supreme Court of Pennsylvania, and affirmed by that Court, and then brought to this Court by writ of error. The judgment of the State Court was here reversed upon the

ground that the imposition of the tax upon the steamship company's receipts amounted to a regulation of interstate commerce. The opinion was written by Mr. Justice BRADLEY, who said, at page 335:

> "The question which underlies the immediate question in the case is, whether the imposition of the tax upon the steamship company's receipts amounted to a regulation of, or an interference with, interstate and foreign commerce, and was thus in conflict with the power granted by the Constitution to Congress. The tax levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different states, and between the states and foreign countries, and from the charter of its vessels which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that and nothing else. In view of the decisions of this court it cannot be pretended that the state could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation,

either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the state without interfering with the power of Congress. Foreign commerce has been fully regulated by Congress, and any regulations imposed by the state upon that branch of commerce would be a palpable interference. * * *

"If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the state, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the state cannot tax transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company, 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be

based on a sound method of reasoning. * * *

Our conclusion is, that the imposition of the tax in question in this cause was a regulation of interstate and foreign commerce, in conflict with the exclusive powers of Congress under the Constitution."

We know of no distinction between the case at bar and the Pennsylvania case, except that in the Pennsylvania case the gross receipts were all from interstate commerce, whereas in the case at bar only a major portion of the receipts are from interstate commerce. This difference, however, does not in any way affect the principle involved, for as was said by this Court in the case of *Crandall* v. *Nevada*, 6 Wall., 35:

> "The State may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State."

THE CASE OF MAINE V. GRAND TRUNK RAILWAY CO., 142 U. S. 217.

The court below placed its decision entirely upon the Maine case (Record, p. 243). The Attorney-General of Texas will no doubt chiefly

rely upon this case in his argument in the case at bar. It was decided by a divided court, five of the Judges holding that the statute under consideration was constitutional and that the case in no way conflicted with the prior decision of the court in the case of Philadelphia Steamship Company v. Pennsylvania, 122 U. S. 326. Four of the judges held that the statute was unconstitutional, and that the decision of the court in the Maine case was a departure from the principles declared in the Philadelphia Steamship Company case.

In the Maine case, it appeared that by an act of the Legislature of Maine every railroad was required to pay to the State "an annual excise tax for the privilege of exercising its franchises" in the State. The section imposing the tax said nothing whatever with reference to the gross receipts of the Railroad Company.

In the next section of the act, reference was made to the gross receipts as required to be returned to the Railroad Commissioners under another act. This section begins with these words:

> "The amount of such tax shall be ascertained as follows: the amount of gross

transportation receipts as returned to the Railroad Commissioners for the year ending on the 30th of September next preceding the levying of such tax, shall be divided by the number of miles of railroad operated to ascertain the average gross receipts per mile, when such average receipts per mile shall not exceed $2,250 the tax shall be equal to one-quarter of one per centum of the gross transportation receipts; when the average receipts per mile exceed $2,250 and do not exceed $3,000 the tax shall be equal to one-half of one per centum of the gross receipts; and so on. * * * "

It will be seen from the foregoing quotation from the Maine statute that there was a somewhat complicated method provided for measuring and ascertaining the tax which had been imposed by the previous section upon the business, and for the privilege of exercising the franchises of the railroad in the State, and that the reference to the gross transportation receipts was to the receipts of the year preceding that in which the tax was imposed. It is further of importance to note that the Maine statute does not itself require a report from the railroads as to their gross receipts, but simply refers to the gross

receipts reported under another act as a means of measuring the tax.

It is hardly necessary to point out the great difference between the Maine statute and the statute in the case at bar. In the latter, the section imposing the tax provided that the railroad should "pay to the State an annual tax for the year 1905, and for each calendar year thereafter equal to one per cent of its gross receipts", while in the Maine case, the tax was imposed upon the business and privilege of exercising the franchises of a corporation in the State, and then afterwards in a separate section a complicated method for ascertaining the amount of that tax was provided, in which reference is made to the gross receipts as returned to the railroad commissioners under the provisions of another act simply for the purpose of determining and measuring the tax imposed by the previous section.

We believe this to be a vital distinction between the Maine case and the Philadelphia Steamship Company case. It is certainly so pointed out by Mr. Justice FULLER in the case of Ficklen v. Shelby County, 145 U. S. 1, where in speaking of the Maine case, he said at page 23:

> "It was held that the reference by the statute to the transportation receipts and to a certain percentage of the same in determining the amount of the excise tax was simply to ascertain the value of the business done by the corporation and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied. In this respect the tax was unlike that levied in Philadelphia Steamship Company v. Pennsylvania, *supra*, where the specific gross receipts for transportation were taxed as such, taxed 'not only because they are money or its value but because they were received for transportation.'"

We quote here in full from that portion of the Philadelphia Steamship Company case from which in the Ficklen case Mr. Justice FULLER made a short extract:

> "The tax in the present case is laid upon the gross receipts for transportation as such. Those receipts are followed and caused to be accounted for by the Company dollar for dollar. *It is those specific receipts or the amount thereof (which is the same thing) for which the Company is called upon to pay the tax. They are taxed not only because they are money or its value, but because they were*

received for transportation. No doubt a ship owner like any other citizen may be personally taxed for the amount of his property or estate without regard to the source from which it was derived, whether from commerce or banking or any other employment, but that is an entirely different thing from laying a special tax on his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts or at the end of every six months or a year, it is an exaction aimed at commerce itself and is a burden upon it and seriously affects it."

The tax in this case is precisely like the tax in the Philadelphia Steamship Company case, and is laid upon the gross receipts of the road's transportation as such; for as we have seen from the language and decision of this Court in the case of the State Tax on Railway Gross Receipts, 15 Wallace, 284, a tax *of* eight-tenths of one per cent. *upon* the gross receipts of said Company is the same thing as a tax, *equal to* eight-tenths of one per cent. *of* the gross receipts of said Company, and

the statute in the Steamship Company case imposes a tax "*of* eight tenths of one per centum *upon* the gross receipts," while the statute in the case at bar imposes a tax "*equal to* one per centum *of* its gross receipts."

Certainly the Maine case is only an authority in cases which are absolutely on all fours therewith. In the present case, the statute under consideration is by no means the same or even similar to the statute in the Maine case. In the latter, a tax was imposed for doing business or "for the privilege of exercising its franchises" in the State of Maine. It was so understood by Mr. Justice FIELD, who, in defining what was meant by an excise tax, said at page 227:

> "The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, *but often denotes an impost for a license to pursue certain callings or to deal in special commodities or to exercise particular franchises.* It is used more frequently in this country in the latter sense than in any other."

It is apparent from the words underscored in the foregoing quotation that this court was of the opinion that the tax imposed by the Maine stat-

ute was a tax upon the business of exercising the franchises of a railroad in the State of Maine. As we have heretofore shown, the tax imposed by the Texas statute is not in any way to be deemed an occupation tax or a franchise tax, as the franchise tax was paid under another law of Texas, as appears by the stipulation in the record (Record, p. 58), and there is nothing in the language of the statute from which it can be gathered that it was intended to impose an occupation tax, or what is the same thing, a tax for the privilege of exercising its franchises.

In addition to this, the reference in the Maine statute to gross receipts, was to gross receipts returned under the provisions of another law, and for the preceding year, and simply as stated in the Act, for the purpose of ascertaining the amount of the tax, while the Texas statute is substantially identical with the law in the Philadelphia Steamship Co. case and lays a tax "upon the gross receipts for transportation as such."

If, however, this court should find that the tax imposed by the Texas Act was an occupation tax, then we insist that the Maine case is not an authority against the plaintiffs in error, for the

reason that the latter is to be limited in its application to a case identical with it in its facts, and it is very clear that even if an occupation tax is imposed by both statutes, yet the reference to the gross receipts of the railroad in the Texas statute is so very different from the reference thereto in the Maine statute that the latter cannot be considered an authority which must be followed, assuming that the Court finds the statute in the case at bar to impose an occupation tax.

It is of course very clear that the mere fact that a State statute lays an occupation tax does not make it constitutional, if in any way it places a burden on interstate commerce. Allen v. Pullman Co., 191 U. S. 171; Kehrer v. Stewart, 197 U. S. 60.

The imposition of the occupation tax in the Maine case was made without reference to the gross receipts of the railroad, except, as stated in the act, for the purpose of ascertaining the amount of the tax; and the gross receipts referred to were those returned to the Railroad Commissioners under the provisions of a prior act, and for a preceding year; while the statute under discussion lays the occupation tax directly upon the gross receipts from interstate commerce, and

therefore places a burden upon interstate commerce itself, and provides in the act itself for a report as to such gross receipts. Under such circumstances and the very material difference in the facts it is not plain how the Maine case can be said to control the present controversy.

We respectfully submit that the single question presented to this Court is, which of the two cases shall it follow in determining the present case. Will it follow the Philadelphia Steamship case, which is on all fours with the present case, for this Court has said in the case of the State Tax on Gross Receipts, 15 Wall, 284, that the language used in the Texas statute is precisely the same as the language used in the Pennsylvania statute, or will it follow the decision in the Maine case, where the tax was an occupation tax imposed on the railroad, and where all reference to the gross receipts was by the terms of the statute for the purpose of ascertaining the amount of such tax, and to gross receipts required to be reported by some prior legislature.

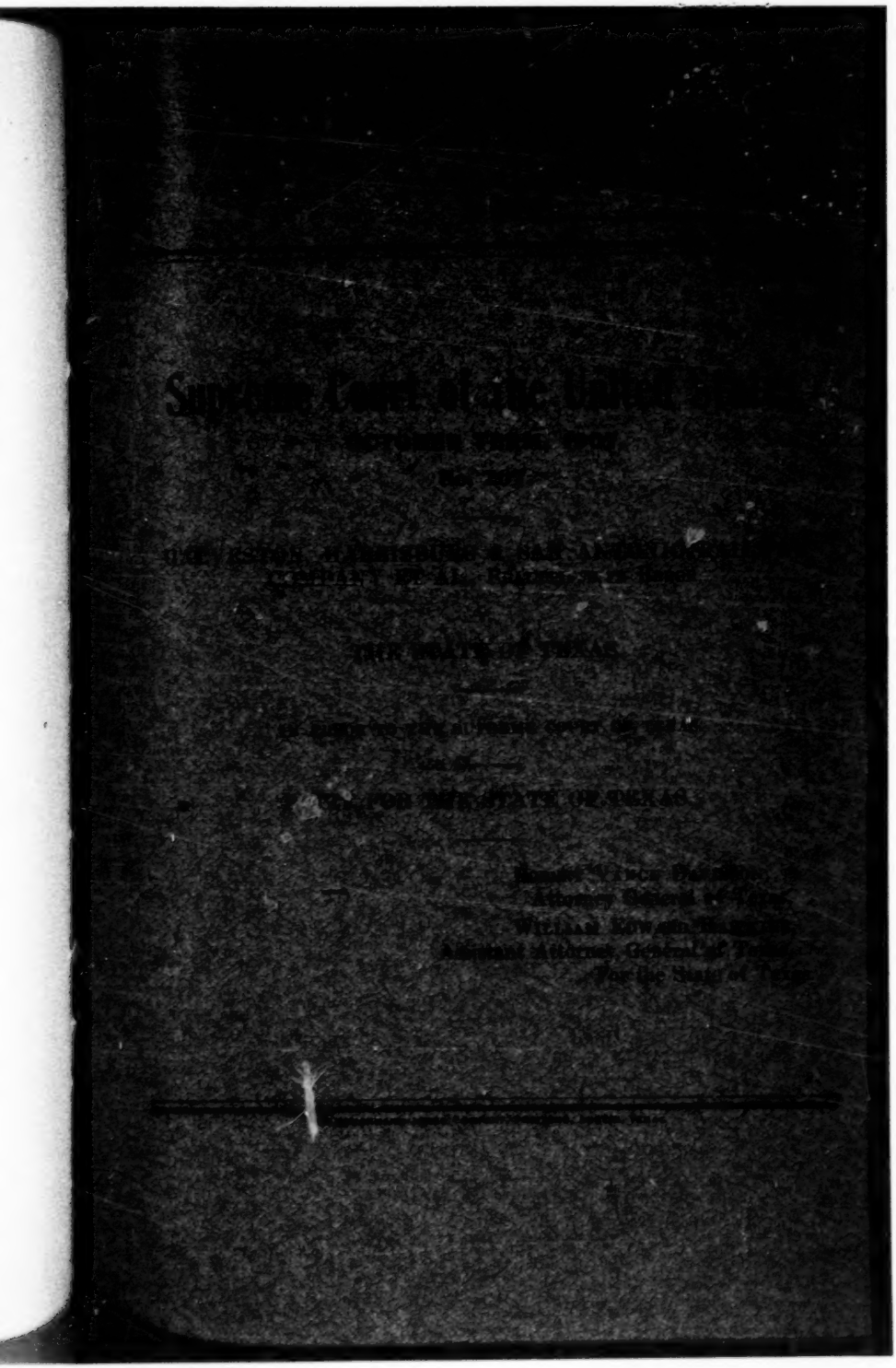
It is difficult to see how any other conclusion can be reached than that this case is necessarily controlled by that prior decision of this Court which the case at bar in its facts most

resembles, viz: the Philadelphia Steamship Company case.

SECOND POINT.

The judgment of the Court below should be reversed.

HIRAM M. GARWOOD,
MAXWELL EVARTS,
Of Counsel for Plaintiffs in Error.



Supreme Court of the United States,

OCTOBER TERM, 1907.

No. 207.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY ET AL., PLAINTIFFS IN ERROR,

v.

THE STATE OF TEXAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

BRIEF FOR THE STATE OF TEXAS.

STATEMENT OF THE CASE.

Except as hereinafter stated, the statement of the case set out in brief for plaintiffs in error appears to be substantially correct; but, for the convenience of the court, we here set out the following statement of the nature and result of the suit:

This suit was filed in the District Court of Travis County, Twenty-sixth Judicial District of Texas, on November 24, 1905, against Galveston, Harrisburg & San Antonio Railway Company; New York, Texas & Mexican Railway Company; Gulf, Western Texas & Pacific Railway Company, and Galveston, Houston & Northern Railway Company, for taxes, penalties and forfeitures under the provisions of Chapter 141 of the General Laws of the Twenty-ninth Legislature of Texas (Acts 1905, pages 336-8), the penalty sued for being 10 per cent of the amount of the taxes, and the forfeitures sued for being $200 per day after November 1, 1905. (R., 1.)

Said statute is set out in full in Appendix "A" following this brief.

The original petition of plaintiff (defendant in error here), alleges that pursuant to an act of the Twenty-ninth Legislature of the State of Texas, approved May 3, 1905 (Special Laws 1905, pages 502-6), the Galveston, Harrisburg & San Antonio Railway Company, in August, 1905, purchased and acquired the railroads, together with the franchises and property thereunto appertaining, of each of its co-defendants and became and is liable for all debts, charges and claims against said co-defendants, respectively. (R., 2-3.)

Trial in the District Court resulted in a judgment of date December 8, 1905, in favor of plaintiff against defendants, respectively, for por-

tions of the taxes sued for. The court held that the State was not entitled to recover of the defendants any penalty or forfeiture whatever, and that the taxes should be proportionate to the unexpired part of the year 1905 after July 15, 1905, the date upon which the statute took effect, and should be calculated upon the gross receipts of the railroad companies, respectively, derived from the transportation of passengers, freight and baggage, excluding all other items of receipts, and rendered judgment accordingly in favor of the State, for the following amounts:

Galveston, Harrisburg & San Antonio Railway Company	$32,743 35
New York, Texas & Mexican Railway Company	2,248 80
Gulf, Western Texas & Pacific Railway Company	659 86
Galveston, Houston & Northern Railway Company	5,695 40
Total	$41,347 41

(R., 38-9.)

The defendants appealed to the Court of Civil Appeals of the Third Supreme Judicial District of Texas at Austin, and cross-assignments of error were filed in behalf of the plaintiff. (R., 122, 124.) On March 21, 1906, the Court of Civil Appeals held said statute unconstitutional, reversed the judgment of the District Court and rendered judgment in favor of defendants.

In May, 1906, application on behalf of the State was made to the Supreme Court of Texas for writ of error, which was granted on June 21, 1906. (R., 238.) On November 7, 1906, the Supreme Court of Texas held that except as to penalties (including forfeitures), said statute is constitutional and that the taxes thereby prescribed should be calculated upon all receipts of the railroad companies, respectively, derived from the operation of their respective lines of railroad, but that the provisions of said statute prescribing penalties (including forfeitures), are excessive and therefore unconstitutional. (R., 239-252.)

The Supreme Court of Texas rendered judgment against the defendants in error and their sureties, as follows:

Galveston, Harrisburg & San Antonio Railway Company	$34,597 68
Galveston, Houston & Northern Railway Company	5,778 11
New York, Texas & Mexican Railway Company	2,357 55
Gulf, Western Texas & Pacific Railway Company	719 94
Total	$43,453 28

—together with interest at 6 per cent per annum from December 8, 1905, the date of the judgment in the District Court, and all costs incurred in the Supreme Court and in the Court of Civil Appeals, respectively. (R., 253.)

Plaintiff filed a motion for rehearing upon the sole question of the constitutionality of the 10 per cent penalty prescribed by the statute. Defendants also filed a motion for rehearing, averring that said statute is in many respects obnoxious to both the State and the Federal Constitution. Both motions were overruled December 5, 1906. (R., 283-4.)

On December 18, 1906, there was filed in this cause, on behalf of said defendant railway companies, and allowed, an application for a writ of error for removal of said cause to the Supreme Court of the United States. (R., pp. 284-8.)

On the same day said defendants (as plaintiffs in error herein), filed eleven assignments of error, assigning errors by the Supreme Court of Texas in its judgment aforesaid, in that the aforesaid statute is violative of the Constitution of the United States upon the several grounds set forth in said assignments of error, respectively. Said assignments of error are shown in full on pages 190-296 of the printed transcript of record.

The trial court did not file conclusions of law in this particular case, but did file conclusions of law in the companion suit brought by The State of Texas against The Texas & Pacific Railway Company for taxes, penalties and forfeitures under said statute, stating therein that same should be considered as conclusions of law in that entire group of cases, including the case here under consideration before this court, and same are set out at pages 40-3 of the printed record in this case.

Therein the trial court referred to and adopted its conclusions of law which had been filed in cause No. 23,335, entitled The Texas & Pacific Railway Company vs. John W. Stephens, et al., same being a suit for injunction to restrain the State officers from enforcing said statute, which suit had just been decided by said trial court. Said conclusions of law in said injunction suit were omitted (through inadvertence, no doubt), from the printed record in this case, but will be found in Appendix "B," following this brief. We beg to call the special attention of this court to said conclusions.

The statement of the case set out in brief for plaintiff's in error alleges that the Comptroller of Public Accounts of the State of Texas, "calculated, estimated and assessed the tax to be paid by each of the said defendants for the year 1905 under said act at the sum of one per cent (1%) of each of the above amounts, being one per cent (1%) of the defendants' gross receipts from whatever source derived for the fiscal year ending June 30, 1905." The facts are that the original petition filed in the trial court in behalf of the State of Texas alleged that said State officer calculated, estimated and assessed at a given sum (naming it) the tax to be paid by each of the defendants (plaintiffs in error here), respectively, "which sum and tax was *equal to* one per centum of the gross receipts of said company from all sources whatsoever for the year ending on the 30th day of June, 1905." (R., 4.)

The evidence supported this allegation of the petition. (R., 45, 46, 47, 48, 49.)

We deem it not inappropriate to add the following:

There are now pending in the appellate courts of the State of Texas, under said statute, fifteen other suits which have been passed to await the determination of this test case, under agreements which are, in general terms, to the effect that such suits shall, respectively, abide the final disposition of corresponding issues in this cause.

One of those cases (Paris & Great Northern Railroad Company vs. John W. Stephens, Comptroller, et al.), arose upon a petition filed in

the District Court to restrain the Comptroller of Public Accounts, the State Treasurer and the Attorney General from the enforcement of said statute, upon the grounds that it is violative of various provisions of the Constitution of the United States, as set forth in the assignments of error filed by defendants in error in this case, and also upon the grounds that said statute is repugnant to various provisions of the Constitution of Texas.

Said Paris & Great Northern Railroad Company tendered to the State Treasurer the amount of taxes which the said District Court afterward found to be due by it under said statute. That court granted said application for an injunction against said State officers (who are the only officers charged by law with the duty of enforcing said statute), restraining them from collecting from that railroad company any additional taxes or any penalties or forfeiture under said statute.

That case having been appealed to said Court of Civil Appeals and having there been continued under an agreement to abide final disposition of the other cases above alluded to, said injunction remains in force and that status must continue until this court shall have made disposition of this cause.

Fourteen of said other cases were brought by the Attorney General of Texas against railroad companies for taxes, penalties and forfeitures under said statute, and in them the trial court rendered judgments in favor of the State of Texas for amounts aggregating the sum of $217,220.86. Computed upon the basis fixed by the opinion and judgments of the Supreme Court of Texas in this case, its judgments in those fourteen cases will aggregate approximately $214,263.12. Adding to that $29,257.19, the approximate amount of the taxes of the Paris & Great Northern Railroad Company, which are involved in said injunction suit, and $43,453.28, the amount of the judgment of the Supreme Court of Texas in this case, we find that there is involved in the cases which arose under said statute and which are now actually pending in this court, the Supreme Court of Texas, and said Court of Civil Appeals, and which will be, in effect, determined by the decision of this court in this case, a grand total of $289,931.33.

While the practical operation and effect of the above-mentioned tax statute has been, by subsequent legislation, materially modified under certain conditions which are within the control of the subjects of taxes thereby pescribed (the railway companies), said statute has not been repealed, and its ultimate enforcement to the extent and purposes for which it remains in effect must await and depend upon the decision by this court of the constitutional questions which are raised by the specifications of error set forth in brief for plaintiffs in error in the case at bar.

ARGUMENT.

As stated in brief for plaintiffs in error (pp. 60-1), the main questions in the case at bar are those concerning INTERSTATE COMMERCE, DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS, and FEDERAL AGENCIES.

Referring to the efforts of the State authorities, and perhaps more

particularly to the opinions of the District Court and of the Supreme Court of the State of Texas, counsel for plaintiffs in error in their brief say: "A feeble attempt is made to make this act an occupation tax and to contend that no burden is thereby laid upon interstate commerce whatsoever, and that the sum charged is one which the corporation must pay for the exercise of its privileges within the State as a carrier of freight and passengers. This contehtion finds no reflection in the phraseology of the bill itself." Counsel have here at least outlined correctly the contention of the State as to the character of the tax, but we take issues with them as to the effect of the phraseology employed in the statute.

FIRST.

THE NATURE AND CHARACTER OF THE TAX AND THE SUBJECT THEREOF.

Unless this court will be bound by the conclusions of the Supreme Court of Texas as to the nature and character of the tax in controversy (which plaintiffs in error seem unwilling to admit), we believe that at the threshold of a consideration of this case there lies, logically, an inquiry as to the nature and character of the tax prescribed by said statute and the subject of the tax, and that such inquiry should precede a discussion, in order, of the principal issues involved; and this conclusion is confirmed by the fact that counsel for the taxpayers in the case at bar have discussed the tax as an occupation tax, an *ad valorem* or property tax, an income tax and a franchise tax, in turn.

BASIS OF OPINION OF SUPREME COURT OF TEXAS AS TO NATURE OF THE TAX.

It is asserted in brief for plaintiffs in error (page 88):

"In the State Supreme Court the act was defined as an occupation tax upon the authority of the *Texas case*, 55 Texas, 314; *State Tax on Railway Gross Receipts*, 15 Wall., 284, and Osborne v. Mobile, 16 Wall., 479."

Not one of those three cases is cited or referred to in the opinion of the Supreme Court of Texas in this case. (R., 239-252.)

A perusal of that opinion will show that its finding that the tax in controversy is an excise or occupation tax was in fact based upon:

(1) Constitution of Texas, Art. 8, Secs. 1 and 9.
(2) Constitution of U. S., Art. 1, Sec. 8, Sub. 3.
(3) Maine Case, 142 U. S., 217.
(4) Phraseology of the Texas statute.
(5) History of similar legislation in Texas.
(6) Osborne v. Florida, 164 U. S., 655.
(7) Kehrer v. Stewart, 197 U. S., 60, 68.

Likewise, said brief asserts, at page 96, that the opinion of the Supreme Court of Texas in this case treats the Steamship Case "as overruled by the Maine v. Grand Trunk Ry., 142 U. S., 217, notwithstanding

the latter case distinctly reaffirms the principles announced in the former."

Now, that opinion of the Supreme Court of Texas does not mention or refer to the Steamship Case in anywise, directly or indirectly; hence said assertion involves a mere assumption upon the part of counsel for plaintiffs in error. We choose to believe, rather, that the Supreme Court had read the Steamship Case carefully and considered that it has no application *on the facts* to the case at bar, and for that reason failed to mention it. Their attention had been called to Erie Railway Co. v. Penn., 93 Wall., 492, sustaining the Pennsylvania statute to practically the same effect as the Texas statute.

They also had before them and discussed upon other points, in their opinion, the opinion of this court in the Maine Case, under a statute practically the same as the Texas statute, wherein this court said:

"The case of Philadelphia and Southern Steamship Co. v. Penn., 122 U. S., 326, in no way conflicts with this decision. That was the case of a tax, in terms, upon the gross receipts of a steamship company, incorporated under the laws of the State, derived from the transportation of persons and property between different States and to and from foreign countries. Such tax was held without any dissent, to be a regulation of interstate and foreign commerce, and, therefore, invalid. We do not question the correctness of that decision, nor do the views we hold in this case in any way qualify or impair it."

THE TAX PRESCRIBED BY CHAPTER 141 OF THE ACTS OF THE TWENTY-NINTH LEGISLATURE OF TEXAS IS AN OCCUPATION TAX.

AUTHORITIES.

Maine v. Grand Trunk Railway, 142 U. S., 217.
State Railroad Tax Cases, 92 U. S., 603.
State Tax on Railway Gross Receipts, 15 Wall., 284.
Osborne v. Mobile, 16 Wall., 479.
Nathan v. Louisiana, 8 How., 73.
Constitution of Texas, Art. 8, Secs. 1, 2, 9 and 17.
State of Texas v. G., H. & S. A. Ry. Co., 97 S. W. Rep., 71.
Albrecht v. State, 8 Texas App., 217.
Languille v. State, 4 Texas App., 322, and cases cited.
State v. Stevens, 4 Texas, 137.
Aulanier v. Governor, 1 Texas, 664.
State v. Bock, 9 Texas, 369.
Thompson v. State, 17 Texas App., 258.
Texas Banking and Ins. Co. v. State, 42 Texas, 637.
Galveston County v. Gorham, 49 Texas, 289.
Blessing v. Galveston, 42 Texas, 660.
Fahey v. State, 27 Texas App., 161.
Higgins v. Rinker, 47 Texas, 396.
Pullman Co. v. State, 64 Texas, 274.
Cumberland R. R. Co. v. State, 52 L. R. A., 756.
Capital City Water Co. v. Board of Revenue, 107 Ala., 303.
Cooley on Taxation, 3rd ed., 1094 *et seq.*

The opinion of the Court of Civil Appeals in discussing the railroad gross passenger receipts tax act, which was substituted and expressly repealed by the Act of 1905, here in controversy, said:

"The law repealed related to tax on gross passenger earnings or an occupation tax, *because the statute expressly made it so*," etc. (Italics ours.)

This seems to be the keynote to the conclusion and holding of the majority of that court that the present tax is not an occupation tax, and is, therefore, unconstitutional.

Viewed from whatever standpoint, and considered in whatever light, the holding of that court that the tax here in controversy is not an occupation tax seems predicated upon and bound up in the idea that no statute should be held as prescribing an occupation tax unless its very terms specifically and expressly declare the tax to be a tax upon an occupation or business, or plainly name it an occupation tax.

It will be noticed that the statute does not denominate the tax therein prescribed an excise tax, a specific tax, a privilege tax, or an occupation tax, nor does it in terms declare that the tax is levied upon the taxpayer for the privilege of exercising franchises within the State.

The caption of the act declares it to be:

"An Act imposing a tax *upon railroad corporations*, receivers thereof, and other persons, firms or associations of persons, owning, operating or controlling a line of railroad in this State for the transportation of passengers, baggage and freight, or either."

This, of itself, negatives the argument of the railroads that the tax is an *ad valorem* or property tax.

There is not in the caption or in the body of the act one word that squints at the idea of a property tax. To hold that it is a property tax would do violence to all known rules of construction and ignore the presumption that the Legislature intended to pass a constitutional measure.

If possible an act must be so construed as to uphold it.

Kehrer v. Stewart,
Osborne v. Florida, 164 U. S., 654.
Hooper v. California, 155 U. S., 648.
Sutherland v. DeLeon, 1 Texas, 305.
State v. G., H. & S. A. Ry., 97 S. W. Rep., 71.
People v. State Board, 105 Am. St., 682, and cases cited.
Gibson County v. Pullman Co., 42 Fed., 572.
Price Co. v. Atlanta, 105 Ga., 358.

An occupation is that which occupies, or engages, the time and attention or the principal business of one's life; vocation; employment; trade. Occupation means a regular business.

Life Ins. Co. v. Frazier, 76 Fed. Rep., 705.
Williams v. State, 23 Texas App., 499, 5 S. W. Rep., 136.
Love v. State, 31 Texas App., 469, 20 S. W. Rep., 978.
Webster's International Dictionary.

An occupation tax is peculiar in its character. It is not a tax upon property, but upon the pursuit which a man follows in order to acquire property. Appeal of Bangor, 109 Pa., 89.

A franchise is a particular privilege conferred by law, emanating from the sovereign power and vested in individuals, or a corporation. Webster's International Dictionary. Words and Phrases, Vol. 3, pp. 2929-2937.

A franchise TO BE A CORPORATION is distinct from a franchise acquired and exercised BY A CORPORATION, to own, maintain and operate a railway. People v. Commissioners, 174 N. Y., 417.

Individuals, whether alone or when associated with others, have an inherent right to pursue some lawful occupation, subject, however, to such taxes as the State may impose.

But a corporation is wholly a creature of the law in so far as its right to exist is concerned. Experience has demonstrated the need for such artificial creations, and so the State, for certain purposes and on certain conditions, grants to an aggregation of individuals a charter authorizing the mere existence of the artificial creature for a term of years. Such right of a mere existence is a primary franchise, vesting, as we have seen, in the individuals who organize the corporation.

To the corporate entity so created the State grants the right which the individual, or the association of individuals, inherently enjoy; viz., the right to do business within the State, or, in other words, to pursue a given occupation.

Memphis & Little Rock R. R. Co. v. Commissioners, 112 U. S., 609.
Horn Silver Mining Co. v. New York, 143 U. S., 313.
People v. State Board, 174 N. Y., 417, 105 Am. State Rep., 674.
Iron Silver Mining Co. v. Cowie, 72 Pac., 1067, 31 Colo., 450.
Words and Phrases, Vol. 3, pp. 2929-2937.

The statute complained of operates on individuals, associations of individuals and corporations, and they are the subjects of the tax.

All persons, natural or artificial, coming with the designated class, become subject to the tax.

The Legislature of Texas had a perfect right to require those owning, operating, managing or controlling a railroad lying, in whole or in part, within this State, to pay, not only an *ad valorem* tax, but also a tax for the privilege of the continued exercise of their franchises to do business within this State; or, in other words, an occupation tax.

The Constitution of Texas places no restriction whatever upon the right of the Legislature to levy an occupation tax upon both individuals and corporations doing business in this State; but, on the contrary, it expressly declares that such right may be exercised by the Legislature, and makes provisions for various kinds of taxes, which are named, and for others which are not named.

Art. 8, Sec. 1, thereof provides:

"Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value which shall be ascertained as may be provided by law. The Legislature may impose a poll tax. It

may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this State. It may also tax incomes of both natural persons and corporations, other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax." * * *

Section 17 of said article reads as follows:

"The specification of the objects and subjects of taxation shall not deprive the Legislature of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this Constitution."

The power of the Legislature of Texas upon the subject of taxation, as declared in our present Constitution, is very broad and comprehensive, and so far as the character of the tax here under consideration is concerned, unquestionably includes it, regardless of the name by which it may be designated.

The right of a State Legislature to impose occupation taxes exists independent of constitutional provisions, and the only purpose of such provisions is to restrict the exercise of that power. Am. and Eng. Ency. of Law, Vol. 21, 2d Ed., 779, and cases cited.

It is true that the act prescribing this tax does not denominate the tax an occupation tax, but we believe that an application to it of the well established principles upon which taxation is based, and a comparison of the act with other statutes, which have always been recognized in Texas by all the departments of government, and generally throughout the United States as occupation tax laws, will necessarily lead to the conclusion that this is an occupation tax.

As illustrations of the general rule, we refer to the following cases:

Pullman Palace Car Co. v. State, *supra*.

This case arose under the Act of March 4, 1881, which imposed on "every person, firm or association of persons owning or running palace, sleeping or dining cars not owned by the railroad company in this State," an annual tax of $2 per mile, etc.

The Supreme Court of Texas, in an opinion by Associate Justice Stayton, said:

"The tax contemplated by this part of the act is not a tax upon property, which, under the Constitution, must be taken in proportion to its value, nor is it a tax upon persons which must be uniform. It is a tax imposed upon a named business which may be carried on by natural persons or by corporations within this State on property belonging to others; and such as is designated in the Constitution as an 'occupation tax.'"

State v. Stevens, 4 Texas, 137, arose under Chapter 122, page 151, of the Acts of 1848, the act being entitled "An Act to raise a revenue by taxation," and providing, among other things, "that each and every person occupied in the sale of goods, wares, merchandise, vinous and spirituous liquors when sold in quantities of a quart or more, shall pay a tax of 20 cents on each $100 value of such goods, etc., and further providing "that the taxes assessed pursuant to this act shall be a lien upon upon all property, real and personal, belonging to the person or persons so assessed, and upon whom the same be imposed. * * *"

Not one word does the statute say about an occupation tax by that name. Nevertheless, the Supreme Court of Texas upheld the tax as an occupation tax, saying: "There can be no doubt that the quarterly return could be legally required from the defendant as an occupation tax, if he was engaged in buying and selling merchandise, or receiving the same for sale as an agent or auctioneer."

This language was quoted approvingly in State v. Bock, 9 Texas App., 369, and controlled the decision in that case.

In that case a very similar tax was called an occupation tax.

Languille v. State, *supra*. The opinion in that case, quoting from Cooley on Taxation, says:

"A tax on the privilege of carrying on a business or employment will commonly be imposed in the form of an excise tax on the license to pursue the employment; and this may be a specific sum, or a sum whose amount is regulated by the business done, or income or profits earned. Sometimes small license fees are required, mainly for the purpose of regulation; but, in other cases, substantial taxes are demanded, because persons upon whom they are laid would otherwise escape taxation in the main, if not entirely."

It is a part of the public history of the State of Texas that this tax act was passed upon the theory that the railroads of Texas have not been paying their just proportion of the taxes necessary to support the government. Indeed, Section 8 of the act itself declares "that the railroads of the State under existing laws pay far less than their fair share of the expenses of the State government."

Again quoting from the same great author, said opinion continues:

"The methods in which persons shall be taxed are also in the legislative discretion. The taxes which are the most customary are (1) on the privilege of carrying on the business; (2) on the amount of business done; (3) on the gross profits of the business; (4) on the net profits, or profits divided. But the taxes may be measured by other standards prescribed for the purpose, as well as these. * * * A tax on the privilege of following any particular employment is usually confined to those which, in some particular, are exceptional, either because supposed to be specifically profitable, or because they require special regulations, or because the privilege is in the nature of a franchise, or because they supply a demand, so that the burden they impose will be generally distributed. But no employment is absolutely exempt from the liability to be taxed. The necessities of the government may require that the lowest employment, as well as the most lucrative, shall contribute to its support, and if any is exempted, motives of policy will govern the discrimination."

In the case of Horn Silver Mining Co. v. New York, *supra*, the Supreme Court of the United States said:

"The granting of the rights and privileges which constitute the franchises of a corporation, being a matter resting entirely within the control of the Legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the Legislature may deem most suitable to the public interests and policy. It may impose, as a condition of a grant, as well as also OF ITS CONTINUED EXERCISE, the pay-

ment of a specific sum to the State each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the same shall be ascertained as may be deemed convenient and just. There is no constitutional inhibition against the Legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation, or of its continued existence. There can be, therefore, no possible objection to the validity of the tax prescribed by the statute of New York, so far as it relates to its own corporations. Nor can there be any greater objection to a similar tax upon a foreign corporation doing business by its permission within the State. * * *

"This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion if any question can ever be considered at rest."

In Maine v. Grand Trunk Railway Co., 142 U. S., 227, which was a case in all essential respects similar to the one at bar, the Supreme Court of the United States said:

"The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation for THE PRIVILEGE OF EXERCISING ITS FRANCHISE within the State of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of a State to levy, there can be no question. The designation does not always indicate merely an inland imposition, or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings, or to deal in special commodities, or to exercise particular franchises. It is used more frequently, in this country, in the latter sense than in any other. The privilege of exercising the franchises of a corporation within a State is generally one of value, and often of great value, and the subject of an earnest contention.

"It is natural, therefore, that the corporation should be made to bear some portions of the burdens of government. As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests of policy. It may require the payment into its treasury each year of a specific sum, or MAY APPORTION THE AMOUNT EXACTED ACCORDING TO THE VALUE OF THE BUSINESS PERMITTED AS DISCLOSED BY ITS GAINS OR RECEIPTS OF THE PRESENT OR PAST YEARS. THE CHARACTER OF THE TAX OR ITS VALIDITY IS NOT DETERMINED BY THE MODE ADOPTED IN FIXING ITS AMOUNT FOR ANY SPECIFIC PERIOD OR THE TIMES OF ITS PAYMENT. The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the State in determining WHAT MAY BE JUSTLY EXACTED FOR THE PRIVILEGE. THE RULE OF APPORTIONING THE CHARGE TO THE RECEIPTS OF THE BUSINESS WOULD SEEM TO BE EMINENTLY REASONABLE, *and likely to produce the most satisfactory results, both to the State and the corporation taxed.*"

In various States similar taxes are called by various names at the will or caprice of the Legislature of the particular State, but in all essential elements they are the same in principle, and are occupation taxes.

In our case, it was clearly the intention of the Legislature to levy upon the railroad corporations A TAX FOR THE CONTINUED EXERCISE OF THE PRIVILEGE OF DOING BUSINESS IN TEXAS, and we submit that it is, in substance and effect, an occupation tax regardless of its appellation. The name of the tax is immaterial; its character is vital.

THE LEGISLATURES OF TEXAS HAVE ALWAYS TREATED, CLASSIFIED AND CONSTRUED GROSS RECEIPTS TAXES AS OCCUPATION TAXES.

Art. 7, Sec. 27, Constitution of Texas, 1845.
Art. 7, Sec. 27, Constitution of Texas, 1861.
Art. 7, Sec. 27, Constitution of Texas, 1866.
Art. 7, Sec. 27, Constitution of Texas, 1869.
Art. 8, Secs. 1 and 2, Constitution of Texas, 1876.
Acts Called Session 12th Leg., 1870, p. 199.
Acts 16th Leg., Gen. Laws, 1879, p. 143.
Acts 17th Leg., Gen. Laws, 1881, p. 58.
Acts 21st Leg., Gen. Laws, 1889, p. 28.
Acts 23d Leg., Gen. Laws, 1893, p. 156.
Rev. Stats., 1895, pp. 1019, 1075.
Acts 25th Leg., Gen. Laws, 1897, pp. 140, 170.
Acts 29th Leg., Gen. Laws, 1905, pp. 347, 427, 336 and 358.
Acts 30th Leg., Gen. Laws, 1907, pp. 479-489.

The statute under consideration is no innovation in the method of taxation in Texas.

Railroad corporations have been paying an occupation tax of the same nature and character in Texas for twenty-six years. (See Acts of the 16th Legislature, General Laws, 1879, page 143; Rev. Stats., Art. 5049, subdivision 42.)

An OCCUPATION TAX MEASURED BY GROSS RECEIPTS is merely one phase of the development of occupation taxes under our State Constitution. A brief consideration of this development will reveal its true character, and furnish conclusive answer to many of the objections raised by counsel for the railroads.

The occupation tax clause of our first State Constitution, Article 7, Section 27, Constitution of 1845, was as follows:

"The Legislature shall have power to lay an income tax, and to tax all persons pursuing an occupation, trade or profession; provided, the term occupation shall not be construed to apply to pursuits either agricultural or mechanical."

The provision was adopted in the Constitutions of 1861, 1866, and 1869 unchanged, except that in the Constitution of 1869 the word "lay" was changed to "levy."

Our present State Constitution embraces the same principles with the important change that CORPORATIONS, *eo nomine*, are added.

Article 8, Constitution of Texas of 1876, provides as follows: "Sec. 1. * * * The Legislature may impose a poll tax; it may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this State. * * *

"Sec. 2. All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax. * * * *"

Under the above constitutional declarations, our system of occupation taxes has expanded and developed from ten subjects classified and taxed by the first Legislature in 1846, to nearly 100 subjects included in Articles 5049 and 5243i of the Revised Statutes of 1895 and the General Laws of 1905, and others were added by General Laws of 1907, pages 479-489. The first gross receipts tax was levied under the Constitution of 1869. An Act of the Called Session of the Twelfth Legislature, approved August 15, 1870, page 199, General Laws, 1869-70 and 71, levied a tax of 2 per cent upon the gross receipts of railroads, insurance and telegraph companies.

Under the provisions of the Constitution of 1876, the Sixteenth Legislature levied a tax of 1 per cent on the gross receipts from passenger travel of railroads, steamboats and stage coaches, and classified the tax as an occupation tax. (Page 143, General Laws of 1879.)

The same provision was re-enacted by the Seventeenth, Eighteenth and Twenty-first Legislatures, and was incorporated in the Revised Statutes of 1895 as Subdivision 36 (Sub. 42 of Sayles' Stat. of 1897), Article 5049, in the same language and under the same title as when enacted in 1879. It remained in force until 1905, when it was repealed by the act under consideration here.

As further illustrating the development of gross receipts taxes in Texas, treated by the Legislature as occupation taxes, and classified by it as such, we submit the following history of gross receipts tax legislation in Texas:

GROSS RECEIPTS OCCUPATION TAXES HAVE BEEN LEVIED IN TEXAS AS FOLLOWS.

1870.

Railroads, insurance and telegraph companies, 2 per cent annually. (Called Session 12th Leg., Acts 1869-70-71, page 199.)

1879.

Railroads, steamboats and stage coaches, 1 per cent quarterly on passenger travel. (General Laws 1879, page 143.)

1881.

Same provisions re-enacted. (General Laws 1881, page 58.)

1889.

Same provisions re-enacted. (General Laws 1889, page 28.)

1893.

Railroads, steamboats and stage coaches, 1 per cent quarterly, as above.
Life insurance companies, 1¼ per cent.
Life and accident insurance companies, 1¼ per cent.
Fire, marine, health, livestock guarantee, or accident insurance companies, one-half of 1 per cent. (General Laws 1893, page 156.)

1895.

Revised Statutes adopted in 1895 included under articles 5049 and 5243e the same subjects as in General Laws 1893.

1897.

Railroads, steamboats and stage coaches, 1 per cent quarterly on passenger travel. (Revised Statutes, Art. 5049, Sub. 42.)
Life insurance companies, 2 per cent gross premium receipts.
Life and accident insurance companies, 2 per cent.
Fire insurance companies, one-half of 1 per cent.
Marine, health, livestock, guarantee, or accident insurance companies, 1 per cent. (Art. 5243e, Revised Statutes, 1895.)
Sleeping, palace and dining car companies, 2½ per cent. (General Laws 1897, page 170.)

1905.

Railroads, 1 per cent annually. (General Laws 1905, page 336.)
Steamboats and stage coaches, 1 per cent quarterly on passenger travel (Revised Statutes, Art. 5049, Sub. 42.)
Express companies, 2¼ per cent annually.
Sleeping, palace and dining car companies, 4 per cent annually.
Telegraph companies, 3 per cent annually.
Telephone companies, 1¼ per cent quarterly.
Surety and guaranty companies, 2 per cent annually.
Commercial agencies, one-half of 1 per cent annually.
Gas, electric light, power plants and waterworks, one-fourth of 1 per cent quarterly.
Stock exchanges, 1¼ per cent quarterly.
Dealers in oil, 2 per cent annually.
Text-book publishers, 1 per cent quarterly.
Private car line companies, 2 per cent quarterly.
Pipe line companies, 2 per cent quarterly.
Oil producers, 1 per cent quarterly. (General Laws 1905, page 358, *et seq.*)
Life insurance companies, 2¼ per cent annually.
Fire insurance companies, 2¼ per cent annually.
Fire and marine, marine, marine and inland, life and accident, life and health, accident, credit, title, steam boiler, live stock and casualty and all other insurance companies, except fidelity and guaranty companies, 1¾ per cent annually. (General Laws 1905, pages 374 and 427.)
In each of the above specified instances the gross receipts tax law applies to persons, firms, associations of persons and corporations.

It is obvious that the tax statute under consideration herein, together with all other tax measures upon gross receipts, passed by the Twenty-ninth Legislature, was but an expansion of that particular branch of occupation taxes which had its inception and introduction into our system in 1870.

In 1870 it was classified as an occupation tax, and it has maintained that character in all subsequent legislation.

The following reference to every act of the Legislature since 1879 concerning gross receipts taxes will reflect the legislative mind as to the character of the tax:

Acts 16th Leg., Gen Laws 1879, Secs. 3 and 4, pages 143-47-48.

Acts 17th Leg., 1881, Sec. 3, pages 54 and 58.

Acts 21st Leg., Gen. Laws 1889, caption and Art. 4665, pages 24-28.

Acts 23rd Leg., Gen. Laws 1893, Sec. 1, page 156.

Revised Statutes 1895, Art. 5049, Sub. 36; Art. 5243e.

Acts 25th Leg., Gen. Laws 1897, Art. 5243e, page 140.

Acts 25th Leg., Gen. Laws 1897, Art. 5243k, and Sec. 2, page 170.

Acts 29th Leg., Gen. Laws 1905. See last paragraph of each section, page 258, *et seq.*, and especially Sec. 14, page 368.

Acts 29th Leg., Gen. Laws 1905, Sec. 1, and Art. 5243e, pages 373 and 374.

Act 29th Leg., Called Session, Gen. Laws 1905, Art. 5243e, pages 427 and 428.

Acts 29th Leg., Gen. Laws 1905, caption and Sec. 6, page 336-338.

Acts 30th Leg., 1st S. S., Chap. 18, pp. 479-490.

THE LEGISLATURES OF TEXAS HAVE TREATED AND CONSTRUED FRANCHISE TAXES AS BEING INDEPENDENT OF AND DISTINCT FROM OCCUPATION TAXES.

The first franchise tax law was passed in Texas in

1893.

Acts 23rd Legislature, General Laws 1893, Sec. 5, page 158, levied an annual franchise tax of $10 against domestic and foreign corporations.

1895.

The same provision was incorporated in the Revised Statutes of 1895, page 1077, as Art. 5243i.

1897.

Art. 5243i, Revised Statutes was amended, General Laws 1897, pages 141 and 168, graduating the tax according to the amount of capital stock, and exempting all transportation companies then paying an income tax on their gross receipts, *which included railroad companies,* and which included sleeping, palace and dining car companies taxed upon their gross receipts in lieu of an arbitrary amount.

Acts 25th Legislature, General Laws 1897, page 170.

1905.

Art. 5243i, as amended by the 25th Legislature, General Laws 1897, was further amended by the 29th Legislature, General Laws 1905, page

22, changing the method of graduating the tax, and exempting the following corporations from the payment of a franchise tax:

"All insurance, surety, guaranty and fidelity companies, all transportation companies, and all sleeping, palace and dining car companies now paying an annual income tax on their gross receipts."

A fact which clearly differentiates the two taxes is that the Legislature has exempted certain corporations that pay an occupation tax calculated upon the gross receipts, from the payment of a franchise tax, an occupation tax calculated upon the gross receipts are *exempt from the payment of a franchise tax*:

Under the laws of Texas, as amended by the Acts of the 29th Legislature, General Laws 1905, the following classes of corporations paying an occupation tax calculated upon the gross receipts are exempt from the payment of a franchise tax:

Railroad companies (Gen. Laws 1905, pages 23 and 336).

Express companies (Gen. Laws 1905, pages 23 and 395).

Sleeping, palace and dining car companies (Laws 1905, pages 23, 359, 360).

Surety and guaranty companies (Laws 1905, pages 23 and 362).

Guaranty and fidelity companies (Laws 1905, pages 23 and 362).

Pipe line companies (Laws 1905, pages 23, 366, Sec. 12).

Insurance companies (Laws 1905, pages 23, 373-4, 427 and 428).

The following are required to pay both a franchise tax and a gross receipts occupation tax:

Telegraph companies (Laws 1905, Sec. 3, pages 360-6).

Telephone companies (Laws 1905, Sec. 4, pages 361-2.)

Commercial agencies (Laws 1905, page 362).

Gas companies (Laws 1905, page 363).

Electric light and power companies (Id.).

Waterworks companies (Id.).

Stock exchanges (Laws 1905, pages 363-4).

Dealers in oil (corporations) (Laws 1905, page 364).

Text-book publishers (corporations) (Laws 1905, page 365).

Private car line companies (corporations) (Laws 1905, page 366).

Oil producers (corporations) (Laws 1905, page 367).

From the foregoing we deem it obvious that such a tax as that levied by the act under which this suit was brought has never been considered by the Legislature as an *ad valorem*, income or franchise tax, but has always been regarded solely as an *occupation tax*.

This court has said: "Again, we can not wholly neglect the long settled law and common understanding of a particular State in considering the plaintiffs' rights."

Otis Co. v. Ludlow Co., 201 U. S., 154.

In construing constitutional provisions this court has in other cases given due effect to the course of history and long established usage in the State by which a law was enacted.

Murray v. Hoboken Land Co., 18 How., 272, 276.

Weimer v. Bunbury, 30 Michigan, 201, 213.

Bell's Gap R. R. v. Pennsylvania, 134 U. S., 232, 237.

The very fact that the act in controversy expressly repeals a law

which unquestionably levied an occupation tax and in its stead substitutes another tax is strongly persuasive that the tax thereby substituted is also an occupation tax. Especially is this true when it is found that the tax before levied and called an occupation tax was upon receipts from passengers, while this tax is also upon receipts from passengers and the two additional items of baggage and freight.

In the case at bar the Supreme Court of Texas held that the tax in question is purely and simply an OCCUPATION TAX. (R., 244-5.)

In New York Central Railroad v. Miller, 202 U. S., 596, this court said: "We are not curious to inquire exactly what kind of a tax this is to be called. If it can be sustained by the name given to it by the local courts it must be sustained by us."

The Supreme Court of the United States will follow the decisions of the Supreme Court of Texas in regard to the meaning of the Constitution and laws of Texas. Kehrer v. Stewart, 197 U. S., 60; Osborne v. Florida, 164 U. S., 560; Turner v. Wilkes Co., 173 U. S., 461; W. U. Tel. Co. v. Henderson, 68 Fed. Rep., 588.

In Gatewood vs. North Carolina, 203 U. S., at page 541, this court, speaking through Mr. Justice White, said: "In the argument it is insisted that the construction given by the Supreme Court of North Carolina to the statute is wrong, since in effect it reads out the provisions of Section 7, and it is urged that it is the duty of this court to disregard the interpretations affixed by the State court, thereby bringing the statute within the prohibitions of the Fourteenth Amendment. But it is elementary that, under the circumstances, we must follow the construction given by the State court, and test the constitutionality of the statute under that view. Armour Packing Co. v. Lacy, 200 U. S., 226; Smiley v. Kansas, 196 U. S., 447, 445, and cases cited."

A franchise tax is a tax *to be;* an occupation tax is a tax *to do.* Corporations may be required to pay both a tax to be and a tax to do, while natural persons are required to pay only a tax to do.

Occupation taxes are collected on only such subjects as the Legislature has selected. All such corporations engaging in such business are by the laws of Texas required to pay both a franchise tax and the occupation tax, unless the act levying the occupation tax exempts said corporation from the payment of the franchise tax.

Counsel for plaintiffs in error in their brief (page 69) aver that "the Legislature which passed the act itself definitely and clearly declared that the tax imposed was not an occupation tax. We challenge the correctness of that statement. We presume that they refer to the fact that in the passage of the act through the Legislature that portion of the caption which refers to the tax as an "occupation tax" was stricken from the bill.

They also urge that the tax is not an occupation tax and that the act is consequently unconstitutional, because the index to the session acts indicates that said tax is "*on the gross receipts*" themselves. In other words, they contend in effect that the failure of the Legislature to specifically name this tax coupled with a purely clerical error made in the office of the Secretary of State in dubbing the statute as one levying a

tax *on* instead of *measured by* gross receipts renders the statute obnoxious to the Federal as well as to the State Constitution.

In the light of the constitutional, legislative and judicial history of tax laws and gross receipts tax laws in Texas and throughout the United States, that argument is evidently far-fetched.

Reference to various railway gross receipts tax laws which have been upheld by this court will show that in many instances such taxes were treated by the court as being occupation taxes, although the statute expressly declared that the tax was upon gross receipts. Several such statutes are specifically shown in this brief, in our discussion of the Commerce Clause.

We submit that, whether tested upon its merits or by the decision of the Supreme Court of Texas and the well-established decisions of this and other courts, the tax in controversy here is unquestionably *an occupation tax*, and we presume that it will be so considered and treated by this court.

Before considering, upon the merits, the Texas statute in connection with the Commerce Clause of the Constitution of the United States, we respectfully point out certain errors into which counsel for plaintiffs in error have fallen, viz.:

Double Taxation Not Imposed.

In their argument to the effect that the Texas statute is repugnant to the Commerce Clause, counsel for plaintiffs in error contend that they are subjected to double taxation, and made the following statements relative to their franchise taxes:

"In the case at bar, the properties of plaintiffs in error including their franchises are taxed *ad valorem* to the same extent as all other property in the State of Texas. Their franchises are specially taxed." (Brief, pp. 123-4.)

Again they say:

"In the case at bar, the plaintiffs in error did pay their full quota of *ad valorem* taxation upon their property within the State which is assessed and valued as all other property. As stated by the Supreme Court of Texas, in State v. A. & N. W. Ry. Co., 94 Texas, 530, the valuation of their real and tangible properties includes their franchise values. In addition to this, they pay a franchise tax." (Brief, p. 146.)

The natural and reasonable effect of the concluding sentences of the above quoted paragraphs, whether considered singly or together, is to lead this court to understand and believe that under the laws of Texas railroad corporations are *required* to pay double taxes upon their *franchises as property;* once along with their ordinary *ad valorem* taxes, and once as special taxes, additionally.

Both of the above quoted statements are, in that respect, incorrect and misleading. The laws of Texas impose upon railroad corporations no franchise tax whatever except as a part of their general *ad valorem* taxes, and this status existed for years prior to the enactment of the Railroad Occupation Tax Act of 1905, which is here in controversy.

As we have shown above, railroad corporations were required by Gen-

eral Laws of 1879, page 143, to pay an occupation tax measured by their tained in the laws of Texas now in force and that requirement was main- which is here before this court for review, by which it was substituted.

That requirement was, consequently, in force when by General Laws of 1897, pages 141, and 168, the franchise tax law was twice amended, and each of the amendatory acts contained the provision that "all transportation companies now paying an annual income tax on their gross receipts in this State shall be exempted from the franchise tax above imposed."

Said exemption in favor of transportation companies was continued in force by Chapter 19 of General Laws of 1905.

The expression "income tax" found in said franchise tax statute was evidently used through inadvertence, inasmuch as the tax was then and had always been expressly called and classified as an *occupation tax* by the statutes levying the tax to which said expression referred.

Moreover, the Supreme Court of Texas, in the above cited Austin & Northwestern Railway case, held in the year 1901 that the franchises of a railroad corporation can not be taxed separately from its ordinary *ad valorem* taxes, and its opinion in that case was expressly and vigorously reaffirmed by that court in its opinion in the case at bar. (R., 247.)

Constitution of Texas, Article 8, Section 1, declares:

"All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed *in proportion to its value*, which shall be ascertained as may be provided by law."

In disposing of the case at bar the Supreme Court of Texas said:

"In argument counsel referred to the case of State of Texas v. Austin & Northwestern Railway Company, 94 Texas, 530, to support the contention, that the property of the railroad companies is subjected to double taxation. In that case the railroad company had rendered its railroad, etc., for taxes under the statute of the State which required that it should render 'the whole length of the railroad and the value thereof per mile, which valuation shall include the right of way, roadbed, superstructure, depots, grounds on which depots are situated, and all shops and fixtures of every kind used in operating said road.' Article 5062 of our Revised Statutes provides that, 'real property, for the purpose of taxation, shall be construed to include the land itself, whether laid out in town lots or otherwise, and all the buildings, structures and improvements, or other fixtures of whatsoever kind thereon, and all the rights and privileges belonging to or in anywise appertaining thereto.' The assessor and collector of Travis county placed an additional assessment upon the railroad company in the following language: 'The intangible personal property of the said Austin & Northwestern Railway Company within the State of Texas, consisting of its rights, privileges, immunities, good will, contracts and franchises to do and carry on business of a railroad company as common carriers of freight and passengers for hire, value of same $835,408.' This court held that the rendition by the corporation under the general law included its franchise to exist as a corporation and its franchise to do business in the

operation of the railroad. After giving the reasons upon which it based the conclusion that the franchise of the corporation was included in the rendition prescribed by the statute, the court said: 'If we are correct in this conclusion, then it follows that it was not the intention of the Legislature to tax the franchise of a railroad as a property separate from its real estate. To so tax it would lead to double taxation, which is not permitted.' This conclusion was based upon the provision of the statute which included the franchise in the assessment of the real estate and thereby subject them to the *ad valorem* tax fixed by law. The additional assessment made by the assessor and collector would have included the property right in the franchise embraced in the first assessment, and, therefore, the court held that it would constitute double taxation and was not permissible."

For counsel for plaintiff in error to thus contend before this court that they are subjected to double taxation *upon their franchises as property*, and to cite in the same paragraph a decision of the Supreme Court of Texas which expressly holds to the contrary, and which was approved and re-affirmed by that court in the case at bar, is somewhat incongruous.

It is true that plaintiffs in error paid franchise taxes for the year 1905. (R., 60.) But, in the light of the foregoing it must be evident to this court that such payments were *purely voluntary*. Why such payments were made we do not know and will not here undertake to suggest; but we do insist that the voluntary payment by them of a small franchise tax should not serve to exempt them from the tax in controversy in this cause, nor to strike down the statute levying this occupation tax as being in contravention of the Constitution of the United States.

In further support of their contention that railroad corporations are by the laws of Texas subjected to double taxation, and immediately following the last above quoted paragraph, is the following:

"In addition to all this, each has paid for the very year involved in this controversy a tax of one per cent on its passenger receipts within the State of Texas."

Now, our contention is that the tax here referred to—which was substituted by the tax in controversy—was not *on the receipts*, but *on the corporation;* the reference to the receipts being merely for a basis by which to fix the amount of the tax. But that involves a mere difference of opinion.

Aside from that feature, however, the statement that such tax was *"for the very year involved in this controversy,"* involves a glaring error as to the real facts of this case, and is not only misleading, but prejudicial.

That tax was paid under the provisions of the above mentioned Chapter 18 of the General Laws of 1897, First Special Session (R. S., 5049, Sub. 42), which was as follows:

"Sub. 42. From every person, firm or association of persons owning or running any railroad cars or steamboats in this State, there shall be collected quarterly, on the first day of January, April, July and October of each year, a tax of one per cent on their gross receipts from

all their passenger travel within this State. The said gross receipts to be returned under oath by said owner, agent or manager to the Comptroller, and said tax to be collected by said Comptroller under such regulations as he may prescribe; provided, that nothing herein contained shall authorize the levy of any county or municipal tax upon such person, firm or association of persons."

As above shown, payment of this same quarterly tax had been required of railroad corporations ever since the statute of 1879 took effect.

The period of time for which such tax was last paid by plaintiffs in error ended with June 30, 1905 (R., 61). In other words, the only portion of the year 1905 for which such tax was paid embraced only the first and second quarters of that year.

The substitute statute of 1905, it being the one under which this suit was brought, did not take effect until July 15, 1905. (R., 239, bottom.) Since said statute of 1905 became effective none of the plaintiffs in error are shown by the record to have paid or tendered any taxes whatever under R. S., 5049. (R., 1-296.) They have, in fact, done neither.

Said statute of 1905, as construed by the State District and Supreme Courts in the case at bar, imposed upon railroad corporations an occupation tax for only 169 days of the year 1905, same being the portion of that year which had not elasped when the act became a law.

Consequently there was a distinct interval of fourteen clear days between the last day of the period of time for which plaintiffs in error paid, under the old law, taxes measured by their *gross receipts from passengers*, and the portion of the year 1905 for which the State of Texas is here seeking to compel them to pay, under the new law, taxes measured by their "gross receipts from all sources whatsoever."

Thus the contentions of plaintiffs in error to the effect that an effort is here being made to subject them to double taxation fall to the ground.

In this connection we call attention to the fact that by Section 6 of said statute of 1905 the former statute, under which the tax was measured by the gross passenger earnings alone, was expressly repealed. By error said Section 6 refers to Subdivision 30 of Revised Statutes, 5049, when subdivision 42 was meant,—but the general terms employed unquestionably embrace the earlier statute. We further suggest that neither the State nor the Federal Constitution inhibits the Legislature of Texas from levying double *occupation taxes* upon either natural persons or corporations, so long as such taxes do not in the aggregate approximate confiscation. But the Legislature has not here attempted to do that.

THE INTANGIBLE ASSETS TAX ACT.

WHERE AN OCCUPATION TAX IS PAYABLE QUARTERLY, AND THE TAX FOR THE FIRST TWO QUARTERS HAS BEEN PAID, BUT THAT FOR THE THIRD QUARTER HAS NOT, THE LEGISLATURE MAY, DURING THE THIRD QUARTER, INCREASE THE AMOUNT OF THE TAX FOR THE REMAINDER OF THE YEAR.

The gross passenger receipts tax prescribed by Act of April 6, 1889, was paid by plaintiffs in error for previous years and for the first and

second quarters of 1905, ending June 30, 1905. (R., 58.) No such tax was paid or tendered by them for any later period of time. The tax statute under which this suit arose took effect July 15, 1905, and under the construction which the Supreme Court of Texas gives to it in this very cause the tax involved in this controversy was for the remaining portion of the year 1905, and not for any portion of time for which any of the plaintiffs in error paid or tendered such gross passenger receipts tax.

Chapter 146 of the General Laws of the Twenty-ninth Legislature of Texas, known as the Intangible Assets Act, and shown as Exhibit "B" of brief for plaintiffs in error, was by its terms inoperative until the first day of January, 1906.

Consequently, said Intangible Assets Act can not in any wise affect the validity of the taxes sued for by the State of Texas in this action.

However, even though the tax for the first two quarters of 1905 had been paid, the Legislature had power to levy another additional tax for the remainder of that year. That power was deliberately exercised by it with regard to gas companies, electric light companies and water-works companies, and also as to sleeping car companies, palace car companies and dining car companies.

The express repeal by the statute under which this suit was brought of the old gross passenger receipts tax statute was an act of leniency on the part of the Legislature toward the railroads, and was not essential to the validity of the tax sued for here.

SECOND.

INTERSTATE COMMERCE.

THE MILEAGE BASIS OF APPORTIONMENT, AS APPLIED BY THE TEXAS STATUTE TO THE GROSS RECEIPTS OF LINES OF RAILROAD LYING PARTLY WITHIN AND PARTLY WITHOUT THE STATE OF TEXAS, IS CONSTITUTIONAL, VALID AND FAIR, AND CORRECTLY AND JUSTLY DETERMINES WHAT PROPORTION OF THE ENTIRE RECEIPTS OF SUCH LINE OF RAILROAD RESULTS FROM BUSINESS DONE WITHIN THE STATE OF TEXAS.

AUTHORITIES.

Michigan Central Ry. Co. v. Powers, 201 U. S., 288.
Adams Express Co. v. Kentucky, 166 U. S., 171, 180.
W. U. Tel. Co. v. Taggart, 163 U. S., 1.
W. U. Tel. Co. v. Massachusetts, 125 U S, 552.
Cleveland, etc., Ry. Co. v. Backus, 154 U. S., 439.
Central Pacific Ry. Co. v. California, 162 U. S., 91.
Maine v. Grand Trunk Ry., 142 U. S., 217.
Pittsburg, etc., Ry. Co. v. Backus, 154 U. S., 421.
Cooley on Taxation, 3d Ed., pages 163-4, and cases cited in notes 1 and 2.

It is conceded that the State has the right to levy an *ad valorem* tax upon all property having a *situs* within the State, although used in interstate commerce. Atlantic, etc., Tel. Co. v. Philadelphia, 190 U. S., 163, and cases cited.

But the State can not levy such tax upon property outside of the State.

It is likewise conceded that where a line of railroad lies partly within and partly without the State, the amount of the *ad valorem* tax may be determined under the mileage basis apportionment rule.

Why may not a State, for the same high reasons, and by the same authority, and by application of a similar rule of apportionment upon the mileage basis, require payment of an *occupation tax measured by gross receipts* by all who do business within her borders, and especially by corporations which she has chartered?

The application of the abovementioned rule of apportionment reduces all subjects of the tax—those having a line of road wholly within the State and those having a line of road partly within and partly without the State—to the common denominator, as it were, of the *amount of business done within the State.*

And what measure of the amount of the tax could be fairer than a given percentage, "calculated on the gross receipts" derived from the business done by the taxpayer within the State? Can any other conceivable measure be more equal and uniform? None has yet been discovered.

A STATUTE MAY AFFECT INTERSTATE COMMERCE WITHOUT AMOUNTING TO A REGULATION THEREOF.

AUTHORITIES.

McLean v. Denver & Rio Grande R. R. Co., 223 U. S., 50.
Ficklen v. Shelby Co., 145 U. S., 21.
Ouichita Packet Co. v. Aiken, 121 U. S., 444.
State Tax on Railway Gross Receipts, 15 Wall., 293.
Sherlock v. Alling, 93 U. S., 99.
Smith v. Alabama, 124 U. S., 465.
Western Union Tel. Co. v. James, 162 U. S., 656.
Cook v. Marshall County, 196 U. S., 261.
Ashley v. Ryan, 153, U. S., 436.
Hopkins v. United States, 171 U. S., 594, and cases cited.
Packet Company v. Bay, 26 Sup. Ct. Rep., 209.
Delaware Railroad Tax, 18 Wall., 232.
Munn v. Illinois, 94 U. S., 135.
G., C. & S. F. Ry. Co. v. Dwyer, 75 Texas, 578.
St. L., S. W. Ry. Co. v. Smith, 49 S. W. Rep., 631.
Western Paper Bag Co. v. Johnson, 38 S. W. Rep., 365.
Cook v. Marshall County, 119 Iowa, 384.
Connell v. Telegraph Co., 108 Mo., 459.
Bridge Co. v. State Board, 25 L. R. A., 136, and cases cited.

We quote from the opinion of this court in Smith v. Alabama, *supra*:

"There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations. * * * To draw the line of interference between the two fields of jurisdiction" (Federal and State), "and to define and declare the instances of unconstitutional encroachment is a judicial question often of much difficulty, the solution of which, perhaps, is not to be found in any single and exact rule of decision. Some general lines of discrimination, however, have been drawn in varied and numerous decisions of this court. It has been uniformly held, for example, that the States can not by legislation place burdens upon commerce with foreign nations or among the several States. 'But upon an examination of the cases in which they were rendered,' as was said in Sherlock v. Alling, 93 U. S., 99, 102, 'it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned OPERATED DIRECTLY UPON COMMERCE, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on.'"

Reference is made, for the purposes of illustration, to the following cases:

The Passenger Cases, 7 How., 445, where a tax was exacted by the laws of New York and Massachusetts from captains of vessels bringing passengers from foreign ports for every passenger landed; Wheeling Bridge Case, 13 How., 518, where a Virginia statute authorized the erection of a bridge which was held to obstruct the free navigation of the Ohio river; Sinnot v. Davenport, 22 How., 227, where a statute required the owner of a steamer navigating the waters of the State to file in the office of the probate judge, before a boat left Mobile, a statement, in writing, setting forth the name of the vessel, and of the owners, and his or their place of residence and interest in the vessel, thus imposing conditions for carrying on coasting trade in the waters of the State in addition to those prescribed by Congress. And therein, as further illustrations, are also cited: Brown v. Maryland, 12 Wheat., 425; State Tonnage Tax Cases, 12 Wall., 204; Welton v. Missouri, 91 U. S., 275.

The principle involved in our next foregoing proposition is well brought out in Hanley v. Kansas City Southern Ry. Co., 187 U. S., 618. In that case the court held that the transportation of goods on a through bill of lading from Fort Smith to Grannis, Kansas, over respondent's railroad by way of Spiro, Indian Territory, is interstate commerce, and is under the regulation of Congress, free from interference by the State of Arkansas. The opinion treats this as a *regulation* of commerce and *draws the distinction* between the issue then before the court and that in

Lehigh Valley Railroad Company v. Pennsylvania, 145 U. S., 192, of which case the court said:

"That was a case of a tax and was distinguished expressiy from an attempt by a State directly to regulate transportation while outside its borders. (145 U. S., 204.) And, although it was intimated that for the purposes before the court, to some extent, commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover, the tax 'was determined in respect of receipts for the proportion of the transportation within the State.' (145 U. S., 201.) Such a proportioned tax had been sustained in the case of commerce admitted to be interstate. Maine v. Grand Trunk Ry. Co., 142 U. S., 217. Whereas, it is decided, as we have said, that when a rate is established, it must be established as a whole."

The opinion of the court in the Lehigh Valley Railroad Case is well reflected in the syllabus, which is as follows:

"A State tax against a railroad corporation, incorporated under its laws, on account of transportation done by it from one point within the State to another point within it, but passing during the transportation without the State, and through part of another State, is not a tax upon interstate commerce, and does not infringe the provisions of the Constitution of the United States."

In the case of Ficklen v. Shelby County, 145 U. S., p. 21, the court said:

"Where a resident citizen engages in general business subject to a particular tax the fact that the business does chance to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants of goods situated in another State, does not necessarily involve the taxation of interstate commerce forbidden by the Constitution."

This case expressly reaffirms the case of Maine v. Grand Trunk Ry. Co., reported in 142 U. S., p. 217.

In Hopkins v. United States, 171 U. S., 594, it is said: "The effect upon the commerce spoken of (interstate commerce) must be direct and proximate."

In the same case it is also said: "Reasonable charges for the use of a facility for the transportation of interstate commerce has heretofore been regarded as valid in this court, even though such charges might necessarily enhance the cost of doing business."

In the same case, at page 597, it is also said: "In all the cases which have come to this court, there is not one which has denied the distinction between a regulation which directly affects and embraces interstate trade or commerce, and one which is nothing more than a charge or a local facility provided for the transaction of such commerce."

In the case of Munn v. Illinois, 94 U. S., p. 135, it is said: "The warehouses in question are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce

itself than the dray or cart by which, but for them, grain would be transferred from one railroad station to another."

This case also expressly reaffirms the case of State Tax on Railway Gross Receipts, reported in 15 Wallace, 293.

In Ouichita Packet Co. v. Aiken, reported in 121 U. S., page 444, it was held that wharf charges in New Orleans, to be measured by the tonnage of the vessels which use the wharves, are not in conflict with the Commerce Clause of the Constitution.

In the case of St. Louis v. Western Union Telegraph Co., reported in 48 U. S., 92, it was held that a tax was valid which was levied upon the Western Union Telegraph Company for the use of the streets of St. Louis. See, also, W. U. Tel. Co. v. Massachusetts, 125 U. S., 531.

In the case of Pullman Palace Car Co. v. Pennsylvania, 141 U. S., 28, it was held that a statute of the State imposing a tax upon the capital stock of all corporations engaged in running railroad cars into, through and out of the State, and having at all times a large number of such cars within the State, was not a violation of the Commerce Clause.

In Dize v. Lloyd, 37 Fed. Rep., it was held that it is no objection to the Maryland oyster law of 1886 that it adopts the tonnage of the vessel employed in dredging as the most reasonable and convenient standard by which to determine the rate of charge to be made for the privilege of taking oysters which are the property of the State. Also, that the provision that having on board instruments for oyster dredging, without having paid the license tax should be *prima facie* evidence of an intention to use the vessel contrary to law, was not a regulation of commerce.

In State Tax on Railway Gross Receipts, 15 Wall., 293, it is said by the court: "Every tax upon personal property, or upon occupations, business or franchises, affects more or less the subjects, and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution"; and this is quoted by the court approvingly in Delaware Railroad Tax, 18 Wall., 232, and in many other cases.

THE TAX PRESCRIBED BY CHAPTER 141 OF THE ACTS OF THE TWENTY-NINTH LEGISLATURE OF TEXAS IS NOT, IN SUBSTANCE OR EFFECT, A TAX, OR A BURDEN UPON, OR A REGULATION OF INTERSTATE COMMERCE.

THE TAX IS NOT UPON ARTICLES OF OR RECEIPTS FROM INTERSTATE COMMERCE, AND SUCH RECEIPTS ARE IMMATERIAL EXCEPT IN SO FAR AS THEY ENTER INTO AND BECOME A PART OF THE MEASURE BY WHICH THE AMOUNT OF THE TAX IS DETERMINED.

AUTHORITIES.

Maine v. Grand Trunk Ry. Co., 142 U. S., 217.
State Tax on Railway Gross Receipts, 15 Wall., 284.
Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S., 387.
Delaware Ry. Tax Case, 18 Wall., 206.

Erie Ry. Co. v. Pennsylvania, 21 Wall., 492.
New York, Lake Erie & Western Ry. Co. v. Pennsylvania, 158 U. S., 431.
McHenry v. Alford, 168 U. S., 651.
State Railroad Tax Cases, 92 U. S., 575.
Nathan v. Louisiana, 8 How., 73.
Home Ins. Co. v. New York, 134 U. S., 594.
Western Union Tel. Co. v. Taggart, 163 U. S., 1.
Horn Silver Mining Co. v. New York, 143 U. S., 315.
New York State v. Roberts, 171 U. S., 664, and cases cited.
Pacific Express Co. v. Siebert, 142 U. S., 350.
Lacy v. Packing Co., 200 U. S., 226.
Cumberland Railroad Co., v. State, 52, L. R. A., 764.

The tax here levied is not *on gross receipts*, but "equal to" a given percentage "calculated on the gross receipts." Section 2 of act.

Lord Eldon held: "Where the salesman has an amount of money equal to one-tenth of the profits ,this gives him no action of account, and, therefore, he is not a partner; but where he is to receive one-tenth of the profits, this gives him an action of account, and, therefore, makes him a partner." Parsons on Contracts, 8th Ed., star page 160.

The word "equal," as used in our statute, means "having the same magnitude, the same value." Webster's International Dictionary.

"Equal" implies, NOT IDENTITY, but duality; the use of one thing as the measure of another. It is so understood in the plain language of the people—it is so interpreted by the courts of the country.

Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co., 59 Fed., 400.
Kentucky & I. Bridge Co. v. Louisville & N. R. R. Co., 37 Fed., 624.
Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co., 63 Fed., 775.

The opinion of the Court of Civil Appeals says:

"The bill we are now considering uses the expression 'a tax equal to 1 per cent of the gross receipts.' Not much importance can be attached to this fact as indicating that the tax is not on gross receipts, because it is apparent that the Legislature used the expression interchangeably with that of 'a tax on gross receipts.'"

We respectfully deny that in the act under consideration the Legislature used the above quoted expressions interchangeably. The expression "a tax on gross receipts" can not be found anywhere in the act from caption to emergency clause; hence the two expressions can not justly be said to have been used interchangeably. The nearest approach to the last quoted expression is found in the concluding portion of Section 2 of the act, in this language: "Shall estimate such tax on the true gross receipts thereby disclosed."

The plain meaning of this language is that the *estimate* is to be made by the Comptroller, and not that the *tax* is "on the true gross receipts."

What is the Comptroller to estimate? A tax. How is the amount of the tax to be determined? The Comptroller "shall estimate it on the true gross receipts" disclosed by the reports of the corporation.

The opinion of the Court of Civil Appeals analyzes the Texas statute

and therefrom draws the conclusion that there is no distinction between a tax *on gross receipts* and a *tax equal to a given percentum of the gross receipts.*

As we have undertaken to show, the act under consideration upon its face draws a sharp and well-defined distinction between the two propositions, and expressly places this tax upon the corporation, or other taxpayer, and refers to the gross receipts *merely for the purpose of fixing a measure for the amount of the tax*, just as was done in the Maine case, which was upheld in the Supreme Court of the United States.

Taking the act as a whole, it is evident that the amount of the tax must be *equal to*, and not *on*, one per centum of the gross receipts.

The very fact that the Legislature took pains to use the words "equal to" instead of "on the gross receipts" indicates a desire to avoid the levy of a tax "on the gross receipts," and signifies their intention to refer to the receipts *merely as the measure of the amount of the taxes.*

The legislative expression, viz., "a tax equal to one per cent of the gross receipts," is an expression, not of form or evasion, but one to express and which does express, in adequate and sufficient language, and with a legal effect, the manifest idea and intent of the Legislature, not to place a tax on the gross receipts, but to define or provide the manner or method by which officers of the State government shall ascertain and collect from the persons or corporations thereby taxed the amount of their occupation taxes; and if this be true, then this purpose and intention of the Legislature so expressed can not be nullified by the mere holding that they designed a violation of the Constitution, and in order not to be caught in the act sought to use language which might mislead and deceive the courts.

But suppose it be conceded, for the sake of argument, that the conclusion of the Court of Civil Appeals on this point is correct, and that there is in fact and in law no real distinction between a tax *on gross receipts* and the tax prescribed by the Texas statute; have we then made any real progress in the discussion? We think not, in view of the fact that the Supreme Court of the United States has so often upheld a tax laid strictly, specifically and expressly *upon gross receipts*, if the mere literal phraseology of the statute, and not its legal effect and meaning, is to be considered.

The following quotations from various statutes and references to decisions thereunder will show how far the Supreme Court of the United States have gone in upholding railroad gross receipts taxes, and how often such taxes have been upheld, even when the statutes prescribing them declared them to be "on the gross receipts" rather than on an amount *equal to a given percentum of such gross receipts.*

PENNSYLVANIA STATUTE OF 1866:

"A tax of three-fourths of one percentum *upon the gross receipts of said company.*"

Approved in State Tax on Railway Gross Receipts, 15 Wallace, 284, when applied to gross receipts of railroads from interstate traffic. Decided in 1872.

PENNSYLVANIA STATUTE OF 1868:

"A tax of three fourths of one percentum *upon the gross receipts of said company.*"

Approved when applied to gross receipts of railroads from interstate traffic, in Erie Ry. Co. v. Pennsylvania, 21 Wallace, [illegible]. Decided in 1874.

PENNSYLVANIA STATUTE OF 1877:

"A tax of eight-tenths of one percentum *upon the gross receipts* of said company."

In Pennsylvania Steamship Co. v. Pennsylvania, 122 U. S., 326, this statute was held unconstitutional as applied to gross receipts of steamship companies having no local business or property in Pennsylvania, and engaged solely in interstate commerce. Decided in 1887.

It will be noted that this Pennsylvania statute was by the court of Civil Appeals found to be practically the same as the Texas statute, and this Steamship Case was by said court cited as conclusively showing the unconstitutionality of the Texas statute. But, as applied to *railroads doing business in Pennsylvania* this provision was upheld by this court, as next shown below.

PENNSYLVANIA STATUTE OF 1879:

"A tax of eight-tenths of one percentum *upon the gross receipts* of said company."

This statute is identical with the Pennsylvania statute of 1877, except that the latter statute is made to include other taxpayers.

Approved as constitutional when applied to gross receipts of railroads from interstate traffic in N. Y., L. E. & W. Ry. Co. v. Pennsylvania, 158 U. S., 431. Decided in 1895.

DELAWARE STATUTE OF 1869:

"A tax of 3 per centum *upon the net earnings or income* received by said railroad or canal company.

This statute was approved in the Delaware Ry. Tax Case, 18 Wallace, 206, when applied to *gross receipts of railroads from interstate traffic.* Decided in 1873.

MAINE STATUTE OF 1881:

"When such average receipts per mile shall not exceed $2250 the tax shall be equal to one-quarter per cent of the *gross transportation receipts,*" etc., the percentum increasing as the receipts vary in amount.

Approved in Maine v. Grand Trunk Ry. Co., 142 U. S., 217, as constitutional when applied to *gross receipts of railroads from interstate traffic.* Decided in 1891.

MICHIGAN STATUTE OF 1897:

"Upon all *of such gross income* not exceeding $2000 per mile of road actually operated within this State, two and one-half per cent of such gross income," etc., the rate per cent varying with the receipts.

Approved as constitutional when applied to *gross receipts of railroads*

from interstate traffic in Wisconsin and Michigan Ry. Company v. Powers, 191 U. S., 387. Decided in 1903.

DAKOTA STATUTE OF 1883:

"For the first five years after said railroad shall be or shall have been operated in whole or in part, *two per cent of such gross earnings;* and for and in each and every year after the expiration of the said five years, *three per cent of the said gross receipts.*"

Approved as constitutional when applied to *gross receipts of railroads from interstate traffic* in McHenry v. Alford, 168 U. S., 651. Decided in 1898.

MARYLAND STATUTE OF 1890:

"A State tax of one per centum shall be and is hereby levied annually *upon the gross receipts* of all railroads worked by steam incorporated by or under the authority of this State and doing business therein."

In C. & P. R. R. Co. v. S. D. L. R. A., 764 Md., the Court of Appeals of Maryland held this statute constitutional as applied to receipts of railroads from interstate traffic. It seems that the case was not appealed to the Supreme Court of the United States.

We come next to:

TEXAS STATUTE OF 1905:

"Equal to one per centum of its gross receipts."

Will the Supreme Court of the United States reverse its decisions upholding similar statutes, and hold the Texas statute unconstitutional, as applied to domestic corporations doing business and having lines of railroad in the State of Texas, the amount of the tax being measured by gross receipts, both intrastate and interstate? We can not believe it.

Among the great number of cases involving the question whether or not such gross receipts taxes are obnoxious to the "commerce clause" of the Constitution of the United States, we refer to those following as illustrating the principles upon which we rely:

STATE TAX ON RAILWAY GROSS RECEIPTS.

The tax involved in this case, 15 Wall., 284, was under a Pennsylvania statute of 1866, providing that "*in addition to the taxes now provided* by law, every railroad * * * and transportation company incorporated under the laws of this Commonwealth, and not liable to the tax upon income under existing laws, shall pay to the Commonwealth a tax of three-fourths of one per centum upon the gross receipts of said company."

It will be noted that said statute purports to levy the tax DIRECTLY UPON THE GROSS RECEIPTS, in which respect it is different from the Texas statute, which is, for that reason, upon the face of the statute, the less open to the suggestion that it levies a tax or imposes a burden upon interstate commerce.

In upholding the statute, this court said:

"VERY MANIFESTLY IT IS A TAX UPON THE RAILROAD COMPANY, MEASURED IN AMOUNT BY THE EXTENT OF ITS BUSINESS, OR THE DEGREE TO WHICH ITS FRANCHISE IS EXERCISED. * * * It is not to be questioned that * * * the tax may be proportioned either to the value of its franchise granted, or *to the extent of its exercise;* nor is it deniable that gross receipts may be a measure of proximate value, or, if not, *at least to the extent of enjoyment.*"

The decision sustaining the tax was based upon two distinct and separate grounds, viz.:

1. That the tax was laid upon a fund which, although derived in part from interstate commerce, had gone into the treasury of the company and had become intermingled with the general property of the carrier.

2. That the States may tax the franchise of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, OR TO THE EXTENT OF ITS EXERCISE.

Note.—In Fargo v. Michigan, 121 U. S., and perhaps in other cases these two grounds have been stated in inverse order, and not always to precisely the same effect.

Conceding that subsequent opinions of that court have held the first ground aforesaid insufficient to support the decision rendered in that case, there remains the indisputable fact that the court has not, in any subsequent opinion, receded from its position that the tax involved in the Pennsylvania case should have been sustained upon the latter portion of the second ground above mentioned, viz., THE EXTENT TO WHICH THE TAXPAYER EXERCISES ITS FRANCHISES TO DO BUSINESS IN THE STATE.

In its discussion of State Tax on Railway Gross Receipts, the Court of Civil Appeals finds that the tax in that case was levied *on the gross receipts*, but says that the doctrine therein announced upholding the tax was "treated really as overruled by Fargo v. Michigan, 121 U. S., 240, and Philadelphia Steamship Company v. Pennsylvania, 122 U. S., 326-8, and in cases by some of the State courts, and must also be considered as impliedly overruled by other cases, so far as it undertakes to impose a tax upon the receipts that arose from interstate commerce, that is in so far as it imposes a tax strictly upon the receipts and not merely upon the franchises."

It will be noticed that while that statement at first glance seems to be to the effect that the case of State Tax on Railway Gross Receipts had been overruled in all respects, the concluding portion of the above quoted paragraph practically admits that that case has never been overruled upon the second ground upon which the decision was based, viz.: That it was a tax *for the exercise of privileges under a franchise to do business in Pennsylvania.* And this second ground, which the court recognizes as never having been overruled, is the very ground upon which we contend that the tax under consideration should be upheld; our contention being that the statutes are practically to the same effect, the difference being in favor of the Texas statute, because under it the tax is declared

to be *equal to a given percentum of the gross receipts*, while under the Pennsylvania statute the tax is expressly laid *upon the gross receipts*.

Instead of the last mentioned case being overruled, either expressly or by implication, it is practically affirmed in Fargo v. Michigan, 121 U. S., 242.

In fact, there was no need for overruling its former decision, aforesaid, in order for this court to decide as it did the Fargo Case, since in the latter case a very different question was presented in the decision of which it was said by the court, with reference to said case in 15 Wallace:

"The distinction between that case, which is mainly relied upon by the Supreme Court of Michigan in support of its decree, and the one which we now have before us is very obvious, and is twofold: First. The corporation which was the subject of that taxation was a Pennsylvania corporation, having the *situs* of its business within the State which created it and endowed it with its franchises. Upon these franchises thus conferred by the State, it was asserted, the State had a right to levy a tax. Second. This tax was levied with money in the treasury of the corporation, upon property within the limits of the State, which had passed beyond the stage of compensation for freight and had become like any other property or money liable to taxation by the State. The case before us has neither of these qualities. The corporation upon which this tax is levied is not a corporation of the State of Michigan, and has never been organized or acknowledged as a corporation of that State. The money which it received for freight carried within the State probably never was within the State, being paid to the company either at the beginning or the end of its route, and certainly at the time the tax was levied it was neither money nor property of the corporation within the State of Michigan."

The effect of the Fargo decision is simply to hold that the Michigan statute was unconstitutional as applied to a car hiring a company *having no property in Michigan*, and doing *no local business in that State* and engaged *solely in interstate commerce*. How similar to the Steamship Case. How can that proposition affect the issue in the case at bar?

Instead of having been overruled, the doctrine embraced in *what was really the second ground* of the opinion in State Tax on Railway Gross Receipts, 15 Wallace, 284, has been repeatedly affirmed.

The decision in that case has been approved in the following, among other cases:

Osborne v. Mobile, 16 Wall., 481.
Delaware Railroad Tax, 18 Wall., 206.
Erie Railway Co. v. Pennsylvania, 21 Wall., 493.
Munn v. Illinois, 94 U. S., 135.
Hall v. DeCuir, 95 U. S., 487.
Maine v. Grand Trunk Ry., 142 U. S., 221.
Kidd v. Pearson, 128 U. S., 23.
Western Union Tel. Co. v. James, 162 U. S., 656.

For a very fine discussion of State Tax on Railway Gross Receipts, in connection with its twin sister, Case of the State Freight Tax, 15

Wall., 274 (which this court considered together), bringing out the distinguishing features in the two cases, and graphically showing how each of them sustains the doctrine upon which we rely, we refer the court to Cumberland Railroad Co. v. State, 52 L. R. A., 764. We consider the latter case, upholding the Maryland statute, a very valuable one in this discussion. We set it over against Delaware & Hudson Canal Co. v. Pennsylvania, 1 L. R. A., 232, from which such copious quotation is made at pages 91-94 of brief for plaintiffs in error.

NATHAN v. STATE OF LOUISIANA, 8 HOW., 73.

In that case an attack was made upon the statute of Louisiana which provided that each and every money or exchange broker shall hereafter pay an annual tax of $250 to the State in lieu of the tax heretofore imposed upon them. The defendant urged that this was in violation of the commerce clause of the Constitution, in that his sole business was buying and selling foreign bills of exchange which are instruments of commerce. The court held the tax valid, and said:

"This is not a tax on bills of exchange. Under the law every person is free to buy or sell bills of exchange as may be necessary in his business transactions. But he is required to pay the tax if he engage in the business of a money or exchange broker.

"The right of a State to tax its own citizens for the prosecution of any particular business or profession within the State has not been doubted. And we find that, in every State, money or exchange brokers, vendors of merchandise of our foreign manufacture, retailers of ardent spirits, tavern keepers, auctioneers, those who practice the learned professions, and every description of property, not exempted by law, are taxed.

"As an exchange broker, the defendant had a right to deal in every description of paper and in every kind of money; but it seems his business was limited to foreign bills of exchange. Money is admitted to be an instrument of commerce, and so is a bill of exchange; and upon this ground it is insisted that a tax upon an exchange broker is a tax upon the instruments of commerce.

"What is there in the products of agriculture, of mechanical ingenuity, of manufactures, which may not become the means of commerce? And is the vendor of these products exempted from State taxation because they may be thus used? Is a tax upon a ship, as property, which is admitted to be an instrument of commerce, prohibited to a State? May it not tax the business of ship-building, the same as the exercise of any other mechanical art, and also the traffic of ship chandlers, and others, who furnish the cargo of the ship and the necessary supplies? There can be but one answer to these questions. No one can claim an exemption from a general tax on his business, within the State, on the ground that the products sold may be used in commerce.

"No State can tax an export or an import as such, except under the limitations of the Constitution, but before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the State, it is a subject of taxation by the State. A cotton

broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation."

In this case it is contended in behalf of the railroad company that, because in its business there is a transportation of goods over its line into Texas, and over its line from Texas to other States, the act is in violation of said Commerce Clause.

This is the same defense of the defendant in the Louisiana case, who was buying and selling foreign bills of exchange, except that his case was stronger than the case of the railroad herein, in that, in the Nathan case, foreign business was his SOLE business; whereas, in the case before the court, it is ONLY A PART of the business in which the Texas corporation is engaged.

The occupation taxes which the State of Texas seeks to collect in this case are, as we have seen, for the continued exercise by the railroad corporation of its privilege of carrying on its business in Texas. Because a part of that business is of an interstate character, it does not follow that the rights of the State government to levy occupation taxes are without any force. According to that doctrine a State might become partially paralyzed and to that extent stripped of its power to maintain its governmental functions because one of its chief sources of revenue, viz., occupation taxes, might be practically destroyed by the subjects or the persons engaged in such occupation, being, to some extent, engaged in interstate commerce.

DELAWARE RAILROAD TAX CASE.

This case, reported in 18 Wallace, 208, shows that Delaware passed an act taxing railroad and canal companies in the State. The first section of the act provided that all railroad and canal companies incorporated under the laws of that State and doing business therein, should, on the 1st day of January of each year afterwards, pay to the Treasurer of the State, *in addition to* the taxes then imposed by law upon such companies, a tax of three per cent upon their net earnings or income received from all sources during the preceding year, with a proviso that when any line of railroad or canal lay partly within the State and partly within an adjoining State, only the part of such net earnings or income of the company should be subject to the tax as would be that proportion of the whole net earnings or income of the company which the length of the road or canal within the limits of the State should bear to the whole length of such road or canal.

This law was also attacked because it was an alleged violation of the Commerce Clause of the Constitution.

The Supreme Court of the United States, through Mr. Justice Field, held the act was constitutional, and said:

"The tax imposed by the act in question affects commerce among the States and impedes the transit of persons and property from one State to another just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed. That taxation produces this result, of itself, constitutes no objection to its constitutionality. As was very justly

observed by this court in a recent case, 'Every tax upon personal property, or upon occupations, businesses or franchises, affects more or less the subjects and the operations of commerce. Yet, it is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution.'

"The exercise of the authority which every State possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon corporations *according to their business or income,* or the value of their property when this is not done by discriminating against rights held in other States, and the tax is not on imports, exports, or tonnage, or transportation to other States, can not be regarded as conflicting with any constitutional power of Congress." (18 Wallace, 232.)

From the Delaware statute the court will see that in no part thereof was the character of the tax or the name of the tax given, but the court treated it as an excise or an occupation tax (just as the Supreme Court of Texas held in the case at bar), and held the same constitutional.

MAINE CASE.

The doctrine upon which we rely, as set forth in State Tax on Railway Gross Receipts, *supra,* was clearly re-announced and sustained in Maine v. Grand Trunk Railway, 142 U. S., 217.

In that case the Supreme Court of the United States considered and discussed anew the Commerce Clause in its relation to the State tax there under consideration, and upheld the constitutionality of the tax. The exhaustive opinion of the court furnishes a conclusive argument in support of our contention that the tax in the case at bar is valid when tested by the Commerce Clause of the Federal Constitution.

That case arose under a statute of Maine passed in 1881, which is set out in connection with the opinion.

Let us briefly analyze the statute:

1. It is entitled "An Act relating to the taxation of railroads," and treats them *as a class,* without including *other common carriers.*

2. It provides that the *buildings, lands and fixtures* of every railroad corporation or association, outside of its located right of way, shall be subject to taxation by the several cities and towns where situated, as other property is taxed therein.

3. It levies upon every corporation, person, or association, operating any railroad in the State of Maine "an annual excise tax *for the privilege of exercising its franchise in this State.*"

4. It provides that said excise tax, TOGETHER WITH THE TAX ON REALTY, above mentioned, shall be in lieu of all other taxes—a feature which is not in the Texas statute, but which, we submit, is an immaterial one.

(Plaintiffs in error contend that this Maine tax was *in lieu of all other taxes.*)

5. It provides a method of providing, by apportionment, the amount of the excise tax, and requires that such amount shall be calculated upon *the entire gross transportation receipts.*

6. It declares that said tax shall be a lien upon the railroad operated, and take precedence over all other liens and incumbrances.

7. It gives to the Railroad Commissioners access to the books of railroad companies to ascertain whether the required returns or reports are correctly made, and provides for a *forfeiture* of not less than $1000 nor more than $10,000 in case of refusal or neglect to make the required returns, or to exhibit books to the Railroad Commissioners as required, or for knowingly making false returns.

8. The act applied alike to railroads lying *wholly within the State* and to railroads lying *partly within and partly without the State.*

Combining (3) and (4) we find a complete answer to the contentions of the taxpayer, as in the case at bar, that the gross receipts tax under the Maine statute was an *ad valorem* tax on franchises as property, and that it was in lieu of all other taxes—the only two features upon which they seek to distinguish, in principle, between the Maine statute and the Texas statute.

Such, in outline, was the statute which was upheld by this court upon exhaustive consideration of arguments practically identical with those offered on behalf of the railroads in testing the Texas statute.

As we understand that decision, it held, in effect:

1. That the tax was upon the *corporation.*

2. That the tax was for the privilege of *exercising the franchise of the corporation to do business within the State.*

3. That a State may levy such a tax in a specific sum, or may, at its option, apportion the amount upon the mileage basis, according to the business permitted and done, as disclosed by the gross receipts of the corporation during the year, or during a period of time already passed.

4. That the *character of the tax and its validity* or invalidity are not determined by the mode adopted in fixing the amount or times of payment.

5. THAT THERE WAS NO LEVY BY THE STATUTE UPON THE RECEIPTS THEMSELVES, IN FORM, OR IN FACT, BUT THAT THE REFERENCE IN THE STATUTE TO THE TRANSPORATION RECEIPTS WAS SIMPLY TO ASCERTAIN THE VALUE OF THE BUSINESS DONE BY THE CORPORATION IN THE EXERCISE OF ITS FRANCHISE, AS A MEANS OF DETERMINING THE AMOUNT OF THE TAX.

In the able brief filed on behalf of the carrier in that case it was argued, as in the case at bar, that the line of decisions which includes Steamship Co. v. Pennsylvania, 122 U. S., 326, called for a decision holding the Maine statute unconstitutional. But the court expressly deny that the case last mentioned in any way conflicts with their decision in the Maine Case, and in so holding say therein with reference to the Steamship Case:

"That was a case of a tax, in terms, upon the gross receipts of a steamship company incorporated under the laws of a State, derived from the transportation of persons and property BETWEEN DIFFERENT STATES, AND TO AND FROM FOREIGN COUNTRIES.

Such tax was held, without any dissent, to be a regulation of interstate and foreign commerce, and, therefore, invalid.

"We do not question the correctness of that decision, nor do the views we hold in this case in any way qualify or impair it."

From this it must be plain to every candid mind that the court considered the point of difference between the cases to lie in the fact that, unlike the Grand Trunk Railway Co., the steamship company was not engaged in business within the State, its business being exclusively interstate and foreign.

The Maine Case, in its application to interstate commerce, has been approved in the following cases:

Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S., 387-8.
Western Union Tel. Co. v. Taggart, 163 U. S., 21.
Adams Ex. Co. v. Ohio, 165 U. S., 220.
Postal Tel. Cable Co. v. Adams, 155 U. S., 699.
Ficklen v. Shelby County, 145 U. S., 23.
New York, Lake Erie & Western Ry. Co. v. Pennsylvania, 158 U. S., 431.

Michigan Central R. Co. v. Powers, 201 U. S., 296. From the opinion of the Supreme Court of the United States in that case, rendered April 2, 1906, we quote the following:

"Maine v. Grand Trunk R. Co., 142 U. S., 217, is worthy of consideration on this question of legislative determination. The Legislature of the State of Maine graded the rate of an excise tax imposed upon railroads by the amount of their gross transportation receipts, and provided that, when a railroad was partly within and partly without the State, the gross receipts chargeable to the road within the State should be ascertained on the mileage basis. The court below held that as the Grand Trunk Railroad was partly within and partly without the State of Maine, the imposition of the tax was a regulation of commerce, and, therefore, in conflict with the exclusive power of Congress over interstate and foreign commerce; and rendered judgment for the company.

"But this court, reversing that judgment, held that the reference to the receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a reasonable conclusion as to the amount of tax which should be levied, saying (p. 229):

"'If the amount ascertained were specifically imposed as a tax, no objection to its validity would be pretended. And if the inquiry of the State as to the value of the privilege were limited to receipts of certain past years instead of years in which the tax is collected, it is conceded that the validity of the tax would not be affected; and if not, we do not see how a reference to the results of any other year could affect its character.'"

As late as its October term, 1903, the Supreme Court of the United States expressly reaffirmed the doctrine of the Maine Case in an opinion which was concurred in by all the members of the court, except Mr. Justice White, who took no part in the decision, as he had not heard the argument at bar. We refer to

WISCONSIN & MICHIGAN RAILWAY CO. v. POWERS, 191 U. S., 387.

We quote from the opinion of the court:

"We need say but a word in answer to the suggestion that the tax is an unconstitutional interference with interstate commerce. In form the tax is on the 'property and business of such railroad corporation within the State,' computed upon certain percentages of the gross income.

"The *prima facie* measure of plaintiff's gross income is substantially that which was approved in Maine v. Grand Trunk Railway Co., 142 U. S., 217, 228. See also Western Union Tel. Co. v. Taggart, 163 U. S., 1."

Thus for thirty-one years—sometimes by a mere majority opinion, but at last with practical unanimity, has the Supreme Court of the United States upheld the doctrine upon which we rely.

This Taggart Case not only upholds the principle of apportionment upon the mileage basis, as we have seen, but also holds the tax not obnoxious to either the *Fourteenth Amendment* or the *Commerce Clause.*

It has been urged in oral argument in behalf of these taxpayers that if the State may include interstate receipts in the measure of the tax, it may measure the tax by the interstate business alone.

The Supreme Court of the United States has said: "The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the Legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction." (18 Wall., 231.)

We are not aware of any limitation upon the right of the Legislature to measure an occupation tax in such manner as it may choose, and hence we are not prepared to admit that the State can not measure the tax by the interstate business done, especially if it be limited to that done *within the State;* but that question is not before the court.

Again, it is likewise insisted that the tax in the Main Case was *in lieu of all other taxes,* and that this feature radically differentiates that case from the one at bar.

We do not so understand the Maine Case, and think that we have shown that the contrary is true. But suppose that tax was in lieu of all others: What difference does that make as regards interstate commerce? The effect of the tax as a regulation of interstate commerce is identical, *in principle,* whether it be called an excise tax or an occupation tax, and whether it be in lieu of all other taxes, or *in addition thereto.* Neither tax affects interstate commerce otherwise than incidentally. (165 U. S., 220; 155 U. S., 688.)

Consequently if valid when in lieu of all other taxes, it must be valid when *in addition to other taxes.*

And in numerous gross receipts tax cases it has been so held

The Delaware Railroad Tax, 18 Wall., 209.
Erie Ry. Co. v. Pennsylvania, 21 Wall., 492.
State Tax on Railway Gross Receipts, 15 Wall., 284.
N. Y., L. E. & W. Ry. Co., 158 U. S., 434.

ALTHOUGH THE TAXPAYER BE UNABLE TO RENOUNCE ITS INTRASTATE OCCUPATION AND THEREAFTER PURSUE ONLY ITS OCCUPATION AS A CARRIER OF INTERSATE AND FOREIGN COMMERCE, THE PRESCRIBED TAX IS NOT OBNOXIOUS TO THE COMMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

The Court of Civil Appeals said:

"The Main case has been cited with approval in other cases, but only apparently on the ground that it was authority in support of the rule that the States could tax a franchise as property of the carriers which had a local *situs*, or within the State; or in cases where the unit rule of taxation was up for application, or in that class of cases where the tax was upon the receipts in lieu of all other taxes which might be a permissible system if the amount does not exceed what would be the reasonable amount of the tax that could be assessed against the property."

That the above conclusion is erroneous is apparent from the opinion in Erie Railroad v. Pennsylvania, 158 U. S., 431, wherein this court, after holding that the statute in that case was valid and not obnoxious to the Commerce Clause, says:

"In Maine v. Grand Trunk Railway, 142 U. S., 217, it was held that a State statute which requires every corporation, person, or association operating a railroad within the State to pay an anuual tax, to be determined by the amount of its gross transportation receipts, and further provides that, when applied to a railroad lying partly within and partly without the State, or to one operated as a part of a line or system extending beyond the State, the tax shall be equal to the proportion of the gross receipts in the State,, to be ascertained in the manner provided by the statute, does not confiict with the Constitution of the United States, and that the tax thereby imposed upon a foreign corporation operating a line of railway partly within and partly without the State, is one within the power of the State to levy."

The question of the validity of a tax on railroads measured by gross receipts from interstate as well as intrastate traffic has been presented to the Supreme Court of the United States seven times in the history of that court, and the validity of the tax has been sustained each time the question has been considered by the court, as follows:

1. Reading Ry. Co. v. Pennsylvania, 15 Wall., 284, sustaining Pennsylvania statute of February 23, 1866. Decision rendered in 1872.

2. Delaware Railway Tax Case, 18 Wall., 206, sustaining statute of Delaware; in 1873.

3. Erie Ry. Co. v. Pennsylvania, 21 Wall., 492, sustaining Pennsylvania statute of May, 1868; in 1874.

4. Maine v. Grand Trunk Ry. Co., 142 U. S., 217, sustaining Maine statute; in 1891.

5. New York, Lake Erie & Western Ry. Co. v. Pennsylvania, 158 U. S., 431, sustaining Pennsylvania statute of June 7, 1879; in 1894. Quotes and approves Maine Case.

6. McHenry v. Alford, 168 U. S., 651, sustaining Dakota statute; in 1898.

7. Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S., 387, sustaining Michigan statute of June 4, 1897; in 1903. Cites and approves the Maine Case.

It is true that in the Maine Case there was a dissenting opinion which argued that the tax was on interstate commerce and, therefore, unconstitutional. The vital issue was clearly drawn.

The dissenting opinion seems to us to have furnished the inspiration for the argument of counsel for the railroad companies in these cases under our Texas statute, and for the adverse opinion of our Court of Civil Appeals. But in Wisconsin & Michigan v. Powers there was no dissent, nor was there in Mich. Cent. R. Co. v. Powers, which expressly approved the decision in the Maine Case.

The opinion of the Court of Civil Appeals presents the view that if the tax be considered an occupation tax, then, since our statute makes no provision for segregating intrastate receipts from the entire receipts, the tax must necessarily be levied upon "receipts that arise from interstate commerce, as well as from local traffic," and that the act is, consequently, obnoxious to the Commerce Clause.

To this suggestion of that court we reply that the tax is not upon receipts, whether derived from intrastate or interstate business, but is upon the corporation "owning, operating, managing or controlling any line of railroad in this State," and the receipts are referred to merely as furnishing a fair measure to indicate the amount of the tax which should be paid for the privilege of exercising a franchise which has been granted by the State.

The opinion of the Court of Civil Appeals seems to proceed upon the theory and in effect to hold that the railroad company is required by law to handle interstate business, whether passengers or freight, *on through contract;* but there is no law requiring them to do so. It was not required of them at common law, and there is no act of Congress or rule of the Interstate Commerce Commission, or statute of the State of Texas, or rule of the Railroad Commission of Texas requiring it. Railroad companies which transact an interstate business on through contracts do so solely by virtue of private contracts and mutual arrangement among themselves and between themselves and their patrons.

Interstate Commerce Commission Report for 1905, pp. 9-10.
L., R. & M. R. Co. v. St. L., I. M. & S. Ry. Co., 41 Fed., 562.
Kentucky Bridge Co. v. L. & N. R. Co., 37 Fed., 570.
Southern P. Co. 200 U. S., 553, and cases cited.

The railroad companies are liable for the tax, although there is in the Texas statute no provision for segregating the receipts derived from their domestic occupation from the receipts derived from their interstate occupation. Under the laws of Texas and under their charters, it is the duty of the railroad companies to carry on their *domestic occupation*, and to handle passengers, freight and baggage within the State of Texas in compliance with law.

Will the mere fact that they *voluntarily* engage in interstate commerce and undertake to handle interstate traffic upon through contracts furnish a pretext for nullifying and declaring unconstitutional a statute which lays upon them an occupation tax for carrying on their business within this State?

The measure of the amount of that tax, as prescribed by our statute, is practically the same as that approved by the Supreme Court of the United States in the Maine Case, which decision it has since repeatedly approved. We have not been able to find where any gross receipts tax which involved the doctrine of apportionment upon the mileage basis, as does the tax here in question, has ever been held obnoxious to the Commerce Clause. The statute under which arose the case of Western Union Tel. Co. v. State, 55 Texas, 314 (U. S., 105), which is referred to by the Court of Civil Appeals, did not involve any idea of apportionment.

We think it may safely be asserted that an unbroken line of decisions of the highest court in the land, announcing a doctrine in which all its members now concur, applies to and must control, in line with our contention, the main issue in the case at bar, and that under those decisions it must be held that the taxes in question here are not obnoxious to Article 1, Section 8, Subdivision 3, of the Constitution of the United States, which provides that the Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

We come now to the mainstay of plaintiffs in error:

PHILADELPHIA STEAMSHIP CO. v. PENNSYLVANIA, 122 U. S., 326.

We quote from brief for plaintiffs in error in the case at bar, page 87:

"It is not possible to distinguish this case from that at bar. In phraseology they (the statutes) are almost identical."

The statutes are, indeed, very similar, but the cases are widely different, and are very easily distinguished, *on the facts*.

The steamship company did in the State of Pennsylvania no intrastate business to form the basis for an occupation tax. Its entire business was interstate and foreign.

Not so with plaintiffs in error.

Their business is intrastate, interstate and foreign. Upon what other distinction or theory did the Supreme Court of the United States strike down said Pennsylvania satute when applied to said steamship company (122 U. S., 326), and afterward uphold that statute when applied to the New York, Lake Erie & Western Railway Company, hav-

ing a line of railroad in Pennsylvania and engaged in intrastate and interstate business? (158 U. S., 431.)

The State Court of Civil Appeals, in discussing the opinion in Steamship Company v. Pennsylvania, 122 U. S., 326, holds, in effect, that the statute of Pennsylvania under which that case arose and the statute of Texas here under consideration are substantially alike, and that the opinion in the Steamship Case is direct authority for them to hold that the Texas act is unconstitutoinal. That they misapprehend the opinion in that case is made manifest by a perusal of it.

That was a case of a steamship company having *no local business or property in Pennsylvania,* and engaged solely in interstate commerce by sea; and as to the steamship company the court held the tax invalid, as an interference with interstate commerce. The defendant pleaded that all of its steamships were enrolled and registered under the laws of the United States for the coasting or foreign trade of the United States, and that the gross receipts so returned and upon which a tax had been levied were received by defendants for freight and passengers carried in said ships on the ocean and on the navigable waters of the United States between the State of Pennsylvania and other States of the United States, and between the States of the United States and foreign countries, *and that no part of said gross receipts were received for the transportation of freight and passengers between places in the State of Pennsylvania or for the hire and use of said steamships within the State of Pennsylvania.* (122 U. S., 328.)

Justice Bradley, in stating the case of the Steamship Company, said:

"The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different States and between the States and foreign countries and from the charter of its vessels, which was for the same purpose." So this transportation was purely and solely interstate and foreign commerce.

On page 342, referring to State Tax on Railway Gross Receipts, the opinion of this court reads:

"The second ground on which the decision referred to was based, was that the tax was upon the franchise of the corporation granted to it by the State. I do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax upon the corporate franchise because by the terms of the act it was laid equally upon the corporations of other States doing business in Pennsylvania."

The decision in this Steamship Case was solely upon the ground that the act was unconstitutional, in so far as it applied to gross receipts of steamship companies *having no local business or property in Pennsylvania, and engaged solely in interstate commerce.*

The Supreme Court of the United States in the Maine Case, in referring to the Steamship Case, said:

"That was a case of a tax in terms upon the gross receipts of a steamship company incorporated under the laws of the State, derived from the transportation of property between different States and to and from

foreign countries. Such tax was held without any dissent to be a regulation of interstate and foreign commerce and, therefore, invalid."

We do not question or doubt the correctness of that decision, nor are the views which we urge on behalf of the State of Texas in this case in any way in conflict with that decision. The Texas statute, by its terms, applies to only every railroad corporation or the receiver thereof, or every other person, firm or association of persons, owning, operating, managing or controlling any line of railroad *in the State of Texas.*

It is in every material respect like the statutes in State Tax on Railway Gross Receipts and the Maine Case, and involves the exercise by the Legislature of Texas of the very power which all of the cases recognize as existing for levying an occupation or a privilege tax upon a corporation doing business in the State.

In the opinion of the Court of Civil Appeals we find the following:

"The case of the Philadelphia S. S. Co. v. Pennsylvania, referred to, is much quoted with approval by recent decisions of the Supreme Court of the United States. * * * It will be observed that the tax construed in this case provided for a tax of a per cent upon the gross receipts of the company for tolls and transportation. The act under consideration in the statute before us is practically to the same effect, omitting the word 'equal,' and is to the same effect when we consider the other parts of Sections 1 and 2 of the statute. * * * It will be observed that when we parallel the statutes there is practically no difference between them. * * * We find that the only difference, which is slight, between the two statutes, is that the Pennsylvania law expressly says 'for doing business in the commonwealth,' and the Texas statute has in it the words, 'on the gross receipts,' 'a sum equal to one per centum of the gross receipts.'"

And after some discussion of the Steamship Case, our Court of Civil Appeals took leave of it as though they considered that the Pennsylvania statutes, under which it arose, had been therein finally disposed of by the Supreme Court of the United States as unconstitutional *when applied to a tax involving gross receipts from both intrastate and interstate business.*

Concerning the discussion by the Court of Civil Appeals of the Steamship Case, we respectfully offer the following observations:

(1) It may be conceded that the only difference between said Pennslyvania statute and our Texas statute are those mentioned in said opinion, and that neither statute expressly declares the tax thereby levied to be an occupation tax or a tax for the continued exercise of privileges under a franchise.

(2) The opinion in referring to the Texas statute places within quotation marks the words "on the gross receipts," as though the tax therein prescribed were *levied on the gross receipts.* As we have elsewhere herein undertaken to show, the statute will not bear this construction. It is the *estimate* of the amount of the tax which is made on the gross receipts, and the statute nowhere says or means that *the tax is on gross receipts*, the reference to the gross receipts being, as in the Maine Case, merely for a measure to determine the amount of the tax.

(3) It may also be conceded, for the sake of argument, that if the

additional words found in the Texas statute had been in the Pennsylvania statute the decision in the Steamship Case would have been the same as the one rendered, such additional words in the Pennsylvania statute (after their supposed embodiment therein), being obnoxious to the Commerce Clause of the Constitution of the United States, *when applied to the receipts of a steamship company having no property and doing no business whatever within the State of Pennsylvania, and being engaged exclusively in interstate and international business.*

But the Court of Civil Appeals seems to have entirely overlooked the following facts, viz.:

(a) The Pennsylvania statute of 1877 and the Pennsylvania statute of 1879 are identical, except that the latter statute includes certain taxpayers who are not embraced in the law of 1877. This addition could not possibly in anywise affect the statute as applied to railroad companies.

(b) The Steamship Company Case was an action for the recovery of taxes under each of said statutes. Both statutes were involved in the decision.

(c) This same Pennsylvania statute of 1879, which, as we have seen, was held unconstitutional in the Steamship Case, as applied to the gross receipts of steamship companies having no business or property within the State, but engaged solely in interstate commerce by sea, was afterwards by the Supreme Court of the United States, in Erie Railroad v. Pennsylvania, 158 U. S., 431, held constitutional and not obnoxious to the Commerce Clause when applied to gross receipts of a railroad from interstate traffic, the railroad being operated within the State of Pennsylvania.

(5) Then if the Court of Civil Appeals be correct in declaring the Texas statute and the Pennsylvania statutes of 1877-79 practically the same, it must necessarily follow, logically, that the Texas statute should, under the authority of the last mentioned case, construing the latter Pennsylvania statute, be held valid and constitutional *when applied to a railroad lying in whole or in part within the State of Texas, and engaged in both intrastate and interstate business.*

In this connection we emphasize the fact that, as stated in the opinion by the Court of Civil Appeals, the Pennsylvania statute contains no words expressly denominating the tax prescribed an occupation tax, and yet, in spite of that fact, in which respect it was like the Texas statute, the Supreme Court of the United States upheld its constitutionality when applied to a railroad doing both intrastate and interstate business in Pennsylvania.

We therefore submit that the argument of the Court of Civil Appeals for the purpose of showing the unconstitutionality of the Texas statute when tested by even the decision in the *Steamship Case*, is, in fact, a very strong argument in favor of the constitutionality of the Texas statute.

The real question here presented is whether the State of Texas has power to compel the railroad companies which were chartered under her laws and which lie wholly within her borders, to pay *any occupation tax whatever* measured by their gross receipts, or whether statutory provisions therefor and even the sections of her Constitution declaring that

the Legislature may levy occupation taxes on all corporations doing business in Texas are meaningless when applied to a corporation which is to any extent engaged in the transportation of interstate commerce. And that is the real contention of plaintiffs in error, as set out in their brief at page 151, in the following language: "We believe that a careful examination of the authorities cited establishes beyond controversy the proposition for which we are contending, viz.: That where the State has taxed the property of a corporation engaged in interstate commerce as other property is taxed, and where such corporation can not go out of the business of handling intra-state commerce, the State can not, in addition thereto, levy an occupation tax or license tax."

The conditions and circumstances involved in the constitutional and legislative history of railroads in Texas are unusual, rendering them peculiarly subject to the operation of a statute like the one under which this controversy arose.

Section 2 of Article 10 of the Constitution of Texas declares:

"Railroads heretofore constructed or which may hereafter be constructed in this State are hereby declared public highways and railroad companies common carriers."

Section 1 provides that they "shall receive and transport each the other's passengers, tonnage and cars, loaded or empty, without delay or discrimination, under such regulations as shall be prescribed by law."

Statutes in pursuance of the foregoing constitutional provisions have been enacted.

The Constitution of Texas, in said Section 1, limits the construction and operation of railroads in Texas by corporations to those organized under her laws for that purpose.

Section 8 of Article 10 reads thus:

"No railroad corporation in existence at the time of the adoption of this Constitution shall have the benefit of any future legislation except on condition of complete acceptance of all the provisions of this Constitution applicable to railroads."

Such acceptance has been made repeatedly by every railroad within the State.

The State of Texas has granted and extended to railroad corporations which she has chartered many rights and privileges not commonly enjoyed by corporations, some of which we have elsewhere herein enumerated, including the right of eminent domain, and to encourage their construction, has given them, including some and perhaps all of the plaintiffs in error, millions of acres of public lands. (81 Texas, 527; R., 108-9.)

As to the effect of such acceptances and agreements and acceptances of charters, land grants, etc., see:

McHenry v. Alford, 168 U. S., 671-2.
Central Pac. R. R. v. California, 162 U. S., 119.
Reagan v. Mercantile Trust Co., 154 U. S., 413.
Texas & Pac. Ry. Co. v. Weatherby, 14 Texas Ct. Rep., 809.
East Line & R. R. R. Co. v. State, 75 Texas, 434.

Over against every constitutional and statutory right, privilege and bonus which the railroad companies enjoy stands a legal and contractual

obligation and moral duty. It is to diligently and faithfully pursue their occupation within this State. Their fealty is primarily due to the sovereign State by whose grace they exist and whose protection they enjoy.

Interstate commerce is an incidental matter, as between the railroads and the State, and should not overshadow, dwarf or destroy the relations existing between the railroads and the State, nor destroy or nullify the power of the State, as declared in its Constitution, to levy upon them an occupation tax, measured by such standard as the Legislature may see fit to adopt.

We do not believe the *Commerce Clause*, when given a fair construction will have that effect, or that, when so construed, there is aught of conflict between it and the Constitution of Texas or the Texas statute.

Nor do any of the cases cited by the railroads in support of their contention logically negative our contention, the facts being duly considered.

Certainly, in the four cases below mentioned (64 U. S., 456; 189 U. S., 420; 191 U. S., 471; 197 U. S., 60), which are relied on by counsel for the railroads, the facts were widely different from the facts in the case at bar.

Here the taxpayers are railroad companies which were chartered under the laws of Texas, and which, respectively, own, operate, manage and control lines of railroads—physical properties—within this State, over which they, respectively, carry on a vast intrastate as well as an extensive interstate business, the transportation of passengers and articles of commerce.

Of the four cases above referred to, two involved a sleeping car company, one an express company and one a packing company. Not one was a railroad case, and in not one was there any provision for apportionment of business done within and without the State levying the tax. Not one was a domestic corporation.

In Osborne v. Florida, 164 U. S., 656, the Supreme Court of Florida had held that the express company was not compelled to handle intrastate business; so the question which confronts us was not before the court, and *the tax was sustained*, although ninety-five per cent of the business was interstate.

Pullman Co. v. Adams, 189 U. S., 420, arose in Mississippi under a statute of that State imposing a tax on every sleeping and palace car company carrying passengers from one point to another within the State.

It is true that Section 195 of the Constitution of that State declared sleeping car companies to be common carriers.

But the Supreme Court of the United States construed the decision of the Supreme Court of Mississippi as holding in effect that the company was free to abandon its intrastate business, and thereupon *sustained the tax*, "notwithstanding the fact that the company offered to show that its receipts from the carrying of the passengers named did not equal the expenses chargeable against such receipts."

Allen v. Pullman Company, 191 U. S., 171, arose under two statutes of Tennessee taxing sleeping cars. It was held that under the statute of 1899 the company was free to renounce its intrastate business, and

that "a tax imposed upon domestic business, under the circumstances shown can not be a burden upon interstate commerce in such sense as will invalidate it."

As to the law of 1887, the tax thereunder was held invalid, but, as we have shown, the status of the company in that State was very different from that of the taxpayer in the case at bar.

Kehrer v. Stewart, 197 U. S., 60, involved a tax prescribed by a Georgia statute upon an Atlanta agent of Nelson Morris Co., packers, of Chicago, Ill. The Supreme Court of Georgia held that "the tax, so far as applied to meats sold in Chicago and shipped to the petitioner in Georgia for distribution, could not be supported, but that, so far as the petitioner was engaged in the business of selling directly to customers in Atlanta, he was engaged in carrying on an independent business as a wholesale dealer, and was liable to the tax"; and that decision the Supreme Court of the United States very properly affirmed.

The right of exemption from taxation must be clearly shown and all doubts should be resolved in favor of the State.

Railroad Co. v. Dennis, 116 U. S., 665.
Railroad Co. v. Thomas, 132 U. S., 185.

THIRD.

THE FACT THAT RAILROAD COMPANIES WHICH ARE SUBJECT TO THE TAX CARRY UNITED STATES MAIL DOES NOT RENDER THE TAX INVALID.

AUTHORITIES.

Thompson v. U. P. R. Co., 76 U. S. (9 Wall.), 579.
Bank v. Kentucky, 76 U. S. (9 Wall.), 353.
U. P. R. Co. v. Peniston, 85 U. S. (18 Wall.), 5.
Santa Clara County v. S. P. R. Co. (C. C.), 18 Fed., 385, 9 Sawy., 165.
Reagan v. Merc. Trust Co., 154 U. S., 413.
Smyth v. Ames, U. S., 466.
First Nat. Bank v. Louisville, 9 Wall., 353.
Huntington v. Railway, Fed. Cas., 6, 911 2 Sawy., 503.

The receipts from sources other than carrying the United States mail are admittedly more than enough to pay the tax.

Unless the tax will impair the agent's efficiency as a Federal agency, the agent can not, upon the ground of such agency, escape the tax; and such impairment is not shown by the record. The company can pay the tax out of intrastate receipts other than those derived from carrying mail and still perform the functions by which it serves the United States.

FOURTH.

FOURTEENTH AMENDMENT.

EQUALITY AND UNIFORMITY OF THE TAX TESTED BY THE CONSTITUTION OF TEXAS.

THE PROVISION THAT "TAXATION SHALL BE EQUAL AND UNIFORM," FOUND IN SECTION 1 OF ARTICLE VIII OF THE CONSTITUTION OF TEXAS DOES NOT APPLY TO THE TAX UNDER CONSIDERATION, IT BEING AN OCCUPATION TAX.

AUTHORITIES.

Constitution of Texas, Art. VIII, Sec. 2.
Languille v. State, 4 Texas App., 312.
Phila. Con. Ins. Co. v. Com., 98 Penna. St., 48.
State v. Phila. Ry. Co., 45 Md., 361.
W U. Tel. Co. v. State Board, 80 Ala., 273.
Goldsmith v. Huntsville, 120 Ala., 182.
People v. Coleman, 4 Cal., 46.
Wintz v. Girardey, 31 La. Ann., 381.
Cooley Const. Lim., 619.

As we have endeavored to show, and as the Supreme Court of Texas held, the tax in question is an occupation tax.

It is generally held that the constitutional provision that "taxes shall be equal and uniform" applies only to a direct tax on property, and does not limit the power of the Legislature as to the objects of taxation, being intended only to prevent the arbitrary taxation of property according to kind or quality, without regard to value. Phœnix Carpet Co. v. State (Ala.), 22 South., 627; Beebe v. Wells (Kan.), 15 Pac., 565; City of Newton v. Atchison (Kan.), 1 Pac., 288.

It is also evident that Section 1 of the Constitution of Texas does not refer to occupation taxes, because they are specifically treated of in Section 2 thereof, which declares that "all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax." Taylor v. Boyd, 63 Texas, 541; Higgins v. Bordages, 88 Texas, 461; Texas Banking Co. v. State, 42 Texas, 636; Blessing v. Galveston, 42 Texas, 641; Fahey v. State, 27 Texas App., 146.

There is thus presented a striking contrast between the effect of the "equal and uniform" clause as embodied in Section 1, upon which there is no express limitation, and its meaning in Section 2, where it has full effect if it operates upon only "the same class of subjects within the limits of the authority levying the tax."

THE TAXES PRESCRIBED BY THE ACT ARE EQUAL AND UNIFORM UPON THE SAME CLASS OF SUBJECTS WITHIN THE LIMITS OF THE AUTHORITY LEVYING THE TAX.

AUTHORITIES.

Constitution of Texas, Art. 8, Sec. 2.
Thompson v. State, 17 Texas App., 256.
Clark v. Finley, 93 Texas, 179.
Albrecht v. State, 8 Texas App., 216.
Languille v. State, 4 Texas App., 312.
Texas Banking and Ins. Co. v. State, 42 Texas, 636.
Blessing v. Galveston, 42 Texas, 641.
Supreme Lodge v. Johnson, 81 S. W. Rep., 18.
Mullinix v. State, 60 S. W. Rep., 768.
Brooks v. State, 58 S. W. Rep., 1032.
Pullman Palace Car Co. v. State, 64 Texas, 274.
Fahey v. State, 27 Texas App., 146.
Ex Parte Williams, 31 Texas Crim. App., 262.
State Railroad Tax Cases, 92 U. S., 576.
Savannah, etc., Ry. v. Savannah, 198 U. S., 392.
Metropolitan St. Ry. Co. v. New York, 199 U. S., 1.
Armour Packing Co. v. Lacy, 200 U. S., 226.
McGhee v. State, 92 Ga., 24 (17 S. E., 276).
Scottish Union Ins. Co. v. Herriott, 109 Iowa, 606.
Hodgson v. City of New Orleans, 21 La. Ann., 301.
People v. Coleman, 4 Cal., 46, 55.
State v. Hammond, 110 La., 186.
Lacy v. Packing Co., 134 N. C., 567.
Tiedeman, Limitations, Sec. 101, p. 282.
Cooley, Const. Limitations, 12, 87, 138.
Cooley on Taxation, 3d Ed., 261-2, 1095.
Burroughs on Taxation, Secs. 53-4.

Does the enumeration of the subjects of the tax, as set out in the act complained of, exhaust the class to which they belong? We contend that it does. In general terms it operates upon railroads only, and railroads, by whomsoever owned, operated, managed or controlled, are, under the laws of Texas generally, and under this occupation tax statute especially, a class unto themselves. And this class is subdivided, for occupation tax purposes, as were insurance companies for another purpose under a Texas statute which was upheld in Fidelity Mutual Life Ins Co. v. Mettler, 185 U. S., 325.

In Pacific Express Co. v. Seibert, 142 U. S., 354, the court said:

"There can be no objection, therefore, to the discrimination made as between express companies defined by this act and other companies or persons incidentally doing a similar business by different means and methods, in the manner in which they are taxed."

Railroad and canal property is distinguished by characteristics sufficiently marked and important to make it a class by itself, and, therefore, may be made the subject of separate legislation for the purpose of taxation. State Board of Assessors v. Central R. Co., 24 Am. and Eng. Ry. Cases, 546; 48 N. J. L., 146, and cases cited.

By a constitutional amendment and statutory enactments pursuant thereto, the people of Texas created a Railroad Commission for the sole

purpose of looking after railroads. In the Revised Statutes of Texas one entire title (ninety-four), is devoted to railroads, and provision is therein made for their incorporation, etc., under different regulations from those applicable to other corporations, to be found in title twenty-one on corporations generally.

In the Constitution of Texas, and throughout the body of her laws, railroads are treated distinctively.

A tax statute should be construed "in accordance with the settled policy of the State." Monticello Dist. Co. v. Baltimore, 90 Md., 416.

It is competent for the Legislature to make classifications for purposes of levying occupation taxes. Connolly v. Union Sewer Pipe Co., 184 U. S., 540; Cargill Co. v. Minnesota, 180 U. S., 452; Kidd v. Alabama, 188 U. S., 730; Cable v. U. S. Life Ins. Co., 191 U. S., 307.

In Savannah, etc., Ry. v. Savannah, 198 U. S., 397, the court sustained "a classification which distinguishes between an ordinary street railway and a steam railroad making an extra charge for local deliveries of freight brought over its road from outside of the city."

In Metropolitan St. Ry. v. New York, 199 U. S., 1, Mr. Justice Brewer, delivering the opinion of this court, said: "There is a difference between the surface and subsurface street railroads sufficient to justify a diversity in the mode and entent of taxation. * * * Further, the condition of the title to the only subsurface road in the City of New York clearly puts it in a class by itself."

The decision of the Supreme Court of Texas in the companion case of the State of Texas vs. The Texas & Pacific Railway Company, holding that company exempt from this tax by reason of the fact that its charter was granted by Act of Congress, when applied to the facts of the case at bar, means merely that the Texas & Pacific Railway Company is, for the reason stated, *in a class by itself*, and not within the class embraced by the act in controversy here.

The classification found in this act is perhaps as natural, and the operation of the law as exhaustive of the class, and as equal and uniform upon the class, as under any other occupation tax statute, anywhere, which can be found.

It may be, and perhaps is, sometimes difficult to define the boundary line of legislative discretion in this matter of classifying the subjects of occupation taxes, but it seems that in imposing this tax the Legislature was safely within the limits of its power.

UNDER THE CONSTITUTION OF TEXAS, THE LEGISLATURE MAY LEVY AN OCCUPATION TAX ON RAILROADS WITHOUT MAKING THE TAX APPLICABLE TO STEAMBOATS AND OTHER COMMON CARRIERS.

Plaintiffs in error are railroad corporations. The evidence shows very little water transportation in Texas. Allison Mayfield testified that he was, and since January, 1897, had been a member of the Railroad Commission of Texas; that "practically all of the freight and passenger business of Texas is done by rail; I am not sufficiently informed to approximate the percentage, but the overwhelming prepon-

derance of it is done by rail transportation; I doubt if one per cent is done over water routes." (R., 117.)

A very large proportion of that water transportation is handled by the Direct Navigation Company, on Buffalo Bayou, between Houston and Galveston. (R., —.)

As disclosed by the evidence, the Southern Pacific Company is the principal owner of the capital stock of the following companies:

Morgan's Louisiana & Texas Railroad and Steamship Line.
Texas & New Orleans Railroad.
Galveston, Harrisburg & San Antonio Railway.
Galveston, Houston & Northern Railway.
Houston, East & West Texas Railway.
New York, Texas & Mexican Railway.
Houston & Texas Central Railroad.
The above constitute the Southern Pacific System.

Following are the companies whose capital stocks are principally owned by Morgan's Louisiana & Texas Railroad & Steamship Company:

Direct Navigation Company.
Gulf, West Texas & Pacific Railway.

Thus, directly and indirectly, the Southern Pacific controls them all. (R., 120.)

AUTHORITIES.

Savannah, etc., Ry. Co. v. Savannah, 198 U. S., 392, 92 U. S., 576, 172 U. S., 325.

Metropolitan St. Ry. Co. v. New York, 199 U. S., 1, 105 Am. St. Rep., 693.

Armour Packing Co. v. Lacy, 200 U. S., 226.

The evidence discloses hardly enough water transportation in Texas to constitute, in this case, "a peg to hang a hat on."

It is, in fact, comparatively inconsequential and insignificant. Most of that little is carried on by the Southern Pacific Company, a concern which owns or controls each of the plaintiffs in error.

But, regardless of the amount of competition by water, it was competent for the Legislature to thus tax or not tax water craft at its pleasure, since all such craft are in a *different class*, or classes.

Under the theory of the taxpayer in this case the Legislature, in prescribing an occupation tax which would reach it, must place in one class all who are engaged in transportation for hire—railroads, steamboats, sailing craft, stage coaches and donkey carts—and tax each and all in the same lump sum, if at all, regardless of the amount of business done by each within the State of Texas.

We beg to dissent from that view.

THE TAX IS NOT VIOLATIVE OF SECTION 2, ARTICLE VIII OF THE CONSTITUTON OF TEXAS, NOR OF SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITU

TION OF THE UNITED STATES, UPON THE GROUND THAT THE VARIOUS RAILROADS WHICH ARE SUBJECT TO THE TAX HAVE DIFFERENT AMOUNTS OF GROSS RECEIPTS FROM INTRASTATE AND INTERSTATE BUSINESS, RESPECTIVELY.

AUTHORITIES.

Pullman Palace Car Co. v. State, 64 Texas, 279.
State Tax on Railway Gross Receipts, 15 Wall., 284.
State Railroad Tax Cases, 92 U. S., 576.
Knoxville & O. R. Co. v. Harris, 43 S. W. Rep., 115.
People v. Home Ins. Co., 92 N. Y., 346.

As we view it, this whole matter is irrelevant and immaterial.

The powers of all railroad corporations are identical, the distinct privileges of all are the same, and the amount of the tax is in direct proportion to the entire gross receipts derived from the exercise of the corporate franchises and privileges. The statute makes no discrimination, but operates alike upon all, no favoritism being indicated and no advantage given. The fact that certain corporations within the class which is subject to the tax enjoy or utilize their franchises to a greater extent and therefrom derive greater revenue is incidental and immaterial. (Pullman P. Car Co. v. State, 64 Texas, 278.)

The *amount* of a State tax and the mode of determining such amount are questions for the Legislature only, and not for the courts, except in cases amounting to or approaching confiscation.

Kehrer v. Stewart, 197 U. S., 69.
Home Ins. Co. v. New York, 134 U. S., 594.
Western Union Tel. Co. v. Massachusetts, 125 U. S., 530.
Pullman Co. v. Pennsylvania, 141 U. S., 18.
Pittsburg R. Co. v. Backus, 154 U. S., 421.
Western Union Tel. Co. v. Taggart, 163 U. S., 1.
Adams E.x Co. v. Ohio, 165 U. S., 194.

Of the action of the Legislature this court will presume that "it has full knowledge of the conditions within the State, and intends no arbitrary selection or punishment, but simply seeks to subserve the general interest of the people.

A., T. & S. F. R. Co. v. Matthews, 174 U. S., 106.

THE ACT COMPLAINED OF DOES NOT PLACE UPON THE RAILROAD COMPANY ANY UNJUST AND ARBITRARY BURDEN OF TAXATION, DENYING EQUAL PROTECTION OF THE LAWS.

AUTHORITIES.

Michigan Central R. R. v. Powers, 201 U. S., 293, 302.
St. John v. New York, 201 U. S., 633.
Hatch v. Reardon, 204 U. S., 158.

Armour Packing Co. v. Lacy, 200 U. S., 226, and *cases cited.*
McCulloch v. Maryland, 4 Wheat., 316.
State Tax on Foreign-held Bonds, 15 Wall., 300.
Delaware Railroad Tax, 18 Wall., 206.
Memphis Gas Light Co. v. Shelby Co., 109 U. S., 398.
Steamship Co. v. Pennsylvania, 122 U. S., 336.
Languille v. State, 4 Texas App., 323.
Ex Parte Williams, 31 Texas App., 262.
Clegg v. State, 42 Texas, 608.
Texas Banking and Ins. Co. v. State, 42 Texas, 640.
Thompson v. State,, 17 Texas App., 257.
Gibson Co. v. Pullman Car Co., 42 Fed., 573.
State v. Hayne, 4 S. C., 403.
People v. Haws, 34 Barb., 69.
People v. Mayor of Brooklyn, 4 N. Y., 419.
Knoxville R. Co. v. Harris, 99 Tenn., 684.
Insurance Co. v. Commonwealth, 133 Mass., 161.
Simmons v. State, 12 Mo., 168.
Cooley on Const. Lim., 508.

It seems that plaintiffs in error have abandoned the contention which they made in all the State courts to the effect that the statute in controversy denies them due process of law. See cases cited in argument for appellee in Michigan Central v. Powers, 201 U. S., 285.

However, they still insist that said statute denies them equal protection of the law.

In its opinion on motion for rehearing the Court of Civil Appeals said:

"It is a serious mistake upon the part of counsel for appellees to say in their sixteenth objection that this court held that the tax imposed was not equal and uniform on the class of subjects embraced in the law We made no such ruling, but, on the contrary, to put this question at rest, so far as this court is concerned, we desire to say that the Chief Justice and Associate Justice Eidson upon this subject entertain a different view from that expressed by Associate Justice Key; and in consultation found, and now find, that there is no objection to the law on the ground of inequality or want of uniformity, if the law should be held to impose a tax upon the occupation." (R., 193.)

The case of Davidson v. New Orleans, 96 U. S., 97, grew out of an assessment of taxes under the statutes of Louisiana upon certain real estate in New Orleans for draining the swamp lands surrounding that city, and was carried to the Supreme Court of the United States upon the ground that the proceeding deprived the owner of his property without due process of law.

Mr. Justice Miller, in delivering the opinion of the court, said:

"The prohibition against depriving the citizen or subject of his life, liberty or property without due process of law is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the Fourteenth Amend-

ment in the year 1866. The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words 'law of the land' in the Great Charter in connection with the writ of *habeas corpus*, the trial by jury and other guarantees of the rights of subject against the oppression of the crown.

"In the series of amendments to the Constitution of the United States, proposed and adopted immediately after the organization of the government, which were dictated by the jealousy of the States, as further limitations upon the power of the Federal government, it is found in the fifth in connection with other guarantees of personal rights of the same character. * * *

"It is not a little remarkable that while this provision (Fifth Amendment) has been in the Constitution of the United States as a restraint upon the authority of the Federal government for nearly a century, and while, during all that time, the manner in which the powers of that government has been exercised has been watched with jealousy and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum, or the more enlarged theater of public discussion; but while it has been a part of the Constitution, as a restraint upon the power of the States only a few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State Legislatures have deprived their own citizens of life, liberty or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem from the character of many of the cases before us, and the argument made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of a decision against them, and of the merits of the legislation on which such a decision may be founded.

"So numerous, so varied, and in many cases so trifling, have been the questions raised as to the protection afforded by this guaranty, that there is much force in the remark of Mr. Justice Mitchell, who, in Com. v. Philadelphia, etc., Coal Co., 145 Pa. St., 283, characterized objections founded upon it as 'those last resorts of desperate cases.'"

In Michigan Central Railroad v. Powers, *supra*, this court, through Mr. Justice Brewer, said:

"There is no general supervision on the part of the Nation over State taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign both as to objects and methods. It was well said by Judge Wanty, delivering the opinion of the Circuit Court in this case (p. 232):

"'There can at this time be no question, after the frequent and uniform expressions of the Federal Supreme Court, that it was not designed by the Fourteenth Amendment to the Constitution to prevent a State from changing its system of taxation in all proper and reasonable ways, nor to compel the States to adopt an ironclad rule of equality, to prevent the classification of property for purposes of taxation, or the imposition

DARK PAGE BLE

of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice.'" The opinion of the Circuit Court here cites Bell's Gap Railroad Company v. Pennsylvania, 134 U. S., 232, and a long line of other decisions of the Supreme Court of the United States.

In Armour Packing Co. v. Lacy, *supra,* this court, in an opinion delivered by Mr. Chief Justice Fuller, quotes approvingly from its opinion in Osborne v. Florida, 164 U. S., 650, as follows:

"'As we have frequently held, the State has the right to classify occupations and to impose different taxes upon different occupations. Such has been constantly the practice of Congress under the internal revenue laws. Cook v. Marshall County, 196 U. S., 261, 275. What the necessity is for such tax, and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the State Legislature. So long as there is no discrimination against citizens of other States, the amount and necessity of the tax are not open to criticism here.' 197 U. S., 69.

"This practically disposes of the fourth and fifth contentions, since the classification of meat packing houses can not be said to be an arbitrary selection or not to rest on reasonable grounds, and the Fourteenth Amendment was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways, or though the undoubted power of classification to impose different taxes upon different trades and professions.

"'A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a State could not tax any property or calling unless, at the same time, it taxed all property or all callings.'"

This court here cited:

Connolly v. Union Sewer Pipe Co., 184 U. S., 540, 562.
Cargill Co. v. Minnesota, 180 U. S., 452.
Kidd v. Alabama, 188 U. S., 730.
Savannah, Thunderbolt, etc., Ry. Co. v. Savannah, 198 U. S., 392.
Minnesota Iron Company v. Kline, 199 U. S., 593.
Cable v. United States Life Ins. Co., 191 U. S., 288, 307.

We quote from Brannon on the Fourteenth Amendment, at page 323:

"In various cases, such as tax laws, and in many other instances, the Legislature may classify persons and things in the administration of government. It does not follow that because one man of one class happens to be treated by law differently from another in another class that the equality clause is violated. It only requires the same means and methods to be applied impartially to all the constitutents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances." Kentucky R. R. Tax Cases, 115 U. S., 321.

The Texas statute operates alike, and without exception, upon all who

BLEED THRU

are subject to the tax. The statute "does not discriminate against some

Merchants Life Ass'n v. Yoakum, 98 Fed. Rep. (C. C. A.), at p. 271.
Barbier v. Connolly, 113 U. S., 27.
Cooley on Taxation, 3rd Ed., p. 72, *et seq.*
Am. & Eng. Enc. of Law, Vol. 21, p. 800, and cases cited in note 3.

From the opinion of Mr. Justice Bradley in Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S., 237, which case involved the validity of a Pennsylvania tax statute, we quote the following:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose a different tax upon different trades and professions, and may vary the rates and excises upon various products; it may also tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character unknown to the practice of our government, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise. We think we are safe in saying that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. * * * The general purpose and scope of the Fourteenth Amendment, and the general qualifications necessary to be applied to it are well stated in Barbier v. Connolly, 113 U. S., 27, 31.

"Mr. Justice Field, in delivering the opinion of the court, there said: 'The Fourteenth Amendment in declaring that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone, except as applied to the same pursuits by others under like circumstances; that

no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed as its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity.'

The case of Home Insurance Co. v. New York, 134 U. S., arose under a statute of New York, which imposed a tax upon "the corporate franchise or business" of all corporations incorporated under any law of that State, or of any other State or country, and doing business within the State, the tax being measured by the extent of the dividends of the corporation in the current year.

The court held that the tax did not deprive the taxpayer of the equal protection of the laws, saying:

"Nor is the objection tenable that the statute, in imposing such tax, conflicts with the last clause of the first section of the Fourteenth Amendment of the Constitution of the United States, declaring that no State shall deprive any person within its jurisdiction of the equal protection of the laws. It is conceded that corporations are persons within the meaning of this amendment. It has been so decided by this court. Pembina Cons. Silver Co. v. Pennsylvania, 125 U. S., 181. But the amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater port of all legislation is special, either in the intent to which it operates or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York, all corporations, joint stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class. See Barbier v. Connolly, 113 U. S., 29, 32; Soon Hing v. Crowley, 113 U. S., 703, 709; Missouri Pacific Ry. v. Humes, 115 U. S., 512, 523; Missouri Pacific Ry. v. Mackey, 127 U. S., 205, 209; Minneapolis Ry. Co. v. Beckwith, 129 U. S., 26, 32."

In Fidelity Mutual Life Association v. Mettler, 185 U. S., 308, Mr. Chief Justice Fuller, in delivering the opinion of this court upholding a Texas statute, said:

"The ground for placing life and health insurance companies in a different class from fire, marine and inland insurance companies is obvious, and we think that putting them in a different class from mutual

benefit and relief associations doing business through lodges and benevolent associations of the character mentioned in the tax statutes is not an arbitrary classification, but rests on sufficient reason."

The case of Pacific Express Co. v. Seibert, 142 U. S., 339, arose under a statute of Missouri which is substantially set out in the statement of the case preceding the opinion of the court, and which was in many respects similar to our statute.

The express company applied to the United States Circuit Court for a writ of injunction to restrain the collection of the tax upon the ground, among others, that the statute denies to the plaintiff the equal protection of the laws, in violation of the Constitution of the United Sates, and in violation of the rule of equality and uniformity of taxation required by the Constitution of Missouri. The Circuit Court refused the writ. 44 Fed. Rep., 310.

The Supreme Court of the United States, in an opinion delivered by Mr. Justice Lamar, affirmed the decree of the Circuit Court. The opinion discloses an exhaustive study and discussion of that clause in the Fourteenth Amendment which prohibits any State from denying to any person within its jurisdiction the equal protection of its laws, and appears to us to answer, conclusively, the contention of counsel for the plaintiffs in error in this case upon that issue.

Upon the whole, we respectfully submit that the judgment of the Supreme Court of Texas in this cause should be by this court in all respects affirmed.

Robert Vance Davidson

Attorney General of Texas,

William Watkins.

Assistant Attorney General of Texas,
For the State of Texas.

APPENDIX "A."

CHAPTER 141, GENERAL LAWS OF THE TWENTY-NINTH LEGISLATURE OF CHAPTER 141, GENERAL LAWS OF THE TWENTY-NINTH LEGISLATURE OF TEXAS (1905), PAGES 336-8.

H. B. No. 52.

An Act imposing a tax upon railroad corporations, the receivers thereof, and other persons, firms and associations of persons owning, operating, managing or controlling any line of railroad in this State, for the transportation of passengers, freight and baggage, or either, equal to one per cent of their gross receipts, and providing for the collection and payment thereof; and repealing the existing tax on the gross passenger earnings of railroads.

SECTION 1. *Be it enacted by the Legislature of the State of Texas:* Every railroad corporation, or the receiver thereof, and every other person, firm, or association of persons, owning, operating, managing or controlling any line of railroad in this State, for the transportation of passengers, freight and baggage, or either, shall pay to the State an annual tax for the year 1905, and for each calendar year thereafter, equal to one per centum of its gross receipts, if such line of railroad lies wholly within the State; and if such line of railroad lies partly within and partly without the State, it shall pay a tax equal to such proportion of the said one per centum of its gross receipts as the length of the portion of such line within the State bears to the whole length of such line; provided, that if satisfactory evidence is submitted to the Comptroller at any time prior to the date fixed in Section 2 of this act for the payment of the tax herein imposed, that any other proportion more fairly represents the proportion which the gross receipts of any railroad for any year within this State bears to its total gross receipts, it shall be his duty to levy and collect for such year from such railroad a tax equal to such other proportion of one per centum of its gross receipts.

SEC. 2. For the purpose of determining the amount of such tax, the president, vice-president, general manager, treasurer, or superintendent of such railroad corporation, or the receiver thereof, or such other person, firm, or association of persons, shall, on or before the first day of October, 1905, and annually thereafter, report to the Comptroller of Public Accounts, under oath, the gross receipts of such line of railroad, from every source whatsoever, for the year ending on the 30th day of June last preceding, and shall immediately pay to the State Treasurer the annual tax herein imposed, calculated on the gross receipts so reported. The Comptroller shall have power to require such other reports and affidavits as may in his judgment be necessary to protect the interests of the State, and he shall estimate such tax on the true gross receipts thereby disclosed, and assess and enforce the collection of such tax.

SEC. 3. Every person required to make report by this act, or by the Comptroller of Public Accounts, under the powers herein given, who shall fail or refuse to make such reports, for a longer period than thirty days, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than one hundred nor more than five hun-

dred dollars, and each day of failure or refusal after said thirty days shall constitute a separate offense.

SEC. 4. Should such report not be filed with the Comptroller, and the annual tax thereon estimated paid to the Treasurer on or before the first day of October of any year, a penalty of ten per centum upon the amount of such tax shall accrue thereon and be added thereto; and in case such report is not made, or such tax and the penalty thereon are not paid, on or before the first day of November thereafter, or in case of a failure to furnish the additional report or affidavit required by the Comptroller, for a longer period than thirty days, after demand therefor, or in case of failure to pay within thirty days any tax or additional tax assessed by the Comptroller under this act, every such railroad corporation, or receiver thereof, or other such person, firm or association of persons, shall forfeit and pay to the State the sum of two hundred dollars for each day any of said reports or payments may be delayed after the expiration of such periods, respectively.

SEC. 5. The Attorney General is authorized and required, upon request by the Comptroller, to bring suit in the name of the State, in Travis county, against the proper parties defendant, to recover all taxes, penalties, and forfeitures mentioned in this act, and venue and jurisdiction of such suits is hereby expressly conferred upon the courts of Travis county. Service of all process issued in such suits may be had upon any officer or agent of such person, firm, association of persons, corporation, or receiver thereof, within this State, and such service shall in all respects be held legal and valid.

SEC. 6. The tax provided for by this act shall be in addition to all other taxes levied by law. Subdivision 36, of Article 5049, Revised Statutes of 1895, and any existing statute imposing a tax upon the gross passenger earnings of railroads, is hereby repealed.

SEC. 7. The tax imposed by this act shall not be levied upon or collected from any person, firm, association, corporation, or receiver, owning, operating, managing, or controlling any line of railroad in this State after such person, firm, association, corporation, or receiver shall have paid the tax upon its intangible assets, as provided for in an Act of the Twenty-ninth Legislature, entitled "An Act for the taxation of the intangible assets of certain corporations, and to provide for the creation of a State Tax Board for the valuation for local taxation, and for the assessment of said assets, and the levy and collection of taxes thereon," while the same may be in force and effect.

SEC. 8. The depleted condition of the Treasury, and the fact that the railroads of the State under existing laws pay far less than their fair share of the expenses of the State government, creates an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect and be in force from and after its passage; and it is so enacted."

(Approved April 17, 1905. Effective July 15, 1905.)

APPENDIX "B."

Conclusions of Law in Injunction Case No. 23,335, the Texas & Pacific Railway Company vs. John W. Stephens, Comptrfller et al.

(Referred to and adopted by the court in conclusions of law filed in No. 23,356, The State of Texas v. The Texas & Pacific Railway Company, with the statement that same shall be considered as the court's conclusions of law in that entire group of cases, including the case which is now pending in the Supreme Court of the United States as No. 207, The Galveston, Harrisburg & San Antonio Railway Company, et al, Plaintiffs in Error, v. The State of Texas.)

"The complainants, who are railway corporations engaged in transporting for hire, passengers, baggage and freight between points in the State of Texas, and who are also engaged in interstate and foreign transportation, have brought this suit to restrain the defendants, who are respectively the Attorney General, the Comptroller and the Treasurer of the State of Texas, from proceedings to enforce against them the collection of the tax provided for by the terms of an act of the Twenty-ninth Legislature of the State of Texas, known as the 'Love Bill,' which act will be found on pages 336 to 338, both inclusive, of the acts of that body.

"The complainants aver that the act mentioned is wholly void, because violative of certain provisions, both of the Federal and State Constitutions. They also claim that if the act be not wholly void, it is void in so far as it attempts to levy against them a tax to be calculated on their receipts from interstate or foreign transportation or on their local transportation for that part of the year 1905 which elapsed prior to the date when said act took effect, viz., July 17, 1905. The prayer of the petition is that the defendants be enjoined from proceeding to collect any part of the tax claimed for the year 1905, if the court should be of the opinion that the entire statnte is void; and in the alternative, that they be enjoined from collecting such part of the tax as is sought to be collected on the basis of their receipts derived from interstate or foreign transportation, or for the part of the year 1905 above specified, even though the court should not be of opinion that the act is wholly void.

"The general demurrer of the defendants to the petition of the complainants has been sustained, and I think it proper to state briefly the conclusions which induced the judgment. They are as follows, viz.:

"1. A State Legislature has power to impose taxes in such amounts and at such times as it sees fit, subject only to the limitations placed on that power by the Federal and State Constitutions.

"The constitutional limitations on the power of the Legislature to impose *ad valorem* taxes are materially different from the limitations on its power to impose occupation taxes.

"It is, therefore, material to determine what character of taxes the bill under consideration attempts to impose, as preliminary to ascertaining whether or not it violates any constitutional provision. The

proper solution of this question depends on the provisions of the bill itself, and not on any opinion as to its legal effect which the Legislature may have entertained if such opinion be not in harmony with those provisions.

"The bill provides, in substance, that each person, association of persons, or corporation, owning, managing or controlling any line of railway in the State, for the transportation of passengers, freight or baggage, shall pay to the State an annual tax for the year 1905, and for each calendar year thereafter. The method of determining the amount of money which is to be paid as taxes by any individual coming within the class designated by the bill is prescribed. It will thus be seen that the tax is sought to be imposed upon all persons of a certain *class* designated by the Legislature. The question of whether any individual comes within the class or not, is left to be determined by the character of the occupation in which such individual is engaged. If his occupation be that named in the statute, he is subject to the tax; otherwise, he is not subject to it. Individuals subject to the tax are required to pay to the State a sum of money. The amount of such sum in each particular case is to be ascertained by reference to the incomes which the individual taxed receives from a certain occupation or business. It is not ascertained by reference to the total value of the property of such individual, subject to taxation, or by reference to the total amount of his income.

"For these reasons, I conclude that the act under consideration provides for the levy and collection of an occupation tax.

"But it is earnestly insisted in the argument that the Legislature which enacted that bill regarded it as a direct *ad valorem* tax on the gross receipts of the class of carriers designated. This opinion, if its existence be conceded, could not prevail in the face of the provisions of the bill itself.

"But evidence is not wanting that the Legislature correctly regarded the bill as imposing an OCCUPATION and not an *ad valorem* tax. In the caption the bill is styled, 'An Act imposing a tax on railroads,' etc. By other legislation passed at the same session, the Legislature provided for the *ad valorem* taxation of all property in the State, subject to such taxation, including all railroad property. If the act under consideration be regarded as imposing an *ad valorem* tax on gross receipts, it, in so far as it seeks to impose taxes on receipts derived from interstate or foreign commerce, violates that provision of the Federal Constitution which gives to Congress the exclusive power to regulate commerce between the States and with foreign nations. It violates that provision of the State Constitution which requires equality and uniformity in taxation, and those other provisions of the said instrument which provide the method of assessing such taxes, and those other provisions thereof which provide the method of equalizing property values for purposes of such taxation, and those other provisions that fix the places where such taxes shall be paid, and those other provisions which fix a maximum limit on the rate which may be levied.

"The presumption that the members of the law-making power have

observed their official oaths, as well as the express provisions of the act itself, negatives the idea that the bill levies an *ad valorem* tax, and also the idea that the Legislature intended so to do.

"2. Having determined that the act imposes an occupation tax, it remains to consider whether, when so construed, it violates any constitutional limitation imposed on the power of the Legislature to levy such taxes.

"One of the limitations placed by the Federal Constitution on the exercise of that power is that the occupation of transporting subjects of interstate or foreign commerce shall not be taxed. Does the act attempt to tax such an occupation? By the provisions of the bill itself, the tax is to be imposed upon all railroad corporations, persons, firms or associations of persons, owning, operating, managing or controlling any line of railroad in the State. There is nothing in this language indicating an intention on the part of the Legislature to tax any individual, association or corporation for the privilege of engaging in the transportation of subjects of interstate or foreign commerce. Railroads in the State are generally engaged in the transportation of subjects of interstate and foreign commerce. They are engaged, at the same time, in a strictly local or intrastate transportation. The power of the Legislature to tax occupations of the latter character is as well settled as is its want of power to tax those of the former character. The Legslature will be presumed to have enacted the statute under consideration with full knowledge of the extent of, and the limitations upon, its power, as above stated. It will also be presumed to have intended by its action a lawful exercise of authority, rather than have attempted an unlawful usurpation of power. I, therefore, conclude that the tax attempted to be imposed upon the class of persons mentioned in the act is a tax upon their occupation of local or interstate transportation, and that it is not a tax imposed upon their occupations of interstate or foreign transportation.

"3. But it is earnestly insisted that, even if it be conceded that the tax is in form one upon the occupation of local or intrastate railroad transportation, it is in substance and reality, a regulation of interstate and foreign commerce, because of the fact that the amount to be paid is made, in some degree, dependent upon the amount of money received by the carrier for the transportation of articles of that character of commerce. It is urged that if a law imposing an annual tax of one per cent directly on the gross receipts of complainants be void to the extent that it attempted to apply same to gross receipts derived from interstate or foreign commerce, a law imposing upon it an annual occupation tax of a sum equal to one per cent of those same receipts for the privilege of pursuing its business of local transportation, must be void to the same extent and for the same reason. It is said that to hold aotherwise would be to disregard the substance for the form of the enactment, and to place a premium on mere ability to juggle with words.

"There is much force in this contention; and, if the question were regarded as an open one under the authorities, there would be great difficulty in arriving at its proper solution. The validity of such a law would, on general principles, seem to follow from the admitted power

of the State to levy on the occupation of local or intrastate transportation, taxes in such amount as the Legislature, in the exercise of its discretion, may prescribe; and the admitted lack of power on the part of the courts to inquire into the *motives* which influence the Legislature in determining the amount of money to be so paid, or to inquire into the *motive* of the Legislature in enacting any other requirement.

"In passing upon and sustaining the validity of a statute of the State of Maine, which is thought to be substantially similar to the law under consideration, the Supreme Court of the United States disposed of the questions here under consideration in the following language, viz.:

" 'The court below held that the imposition of the taxes was a regulation of commerce, interstate and foreign, and, therefore, in conflict with the exclusive power of Congress in that respect. On that ground alone it ordered judgment for the defendant. This ruling was founded on the assumption that a reference by the statute to the transportation receipts and to a certain percentage of same in determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and, therefore, an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation. If the amount ascertained were specifically imposed as the tax, no objection to its validity would be pretended. And if the inquiry of the State as to the value of the privilege were limited to receipts of certain past years, instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected; and if not, we do not see how a reference to the results of any other year could affect its character. There is no levy by the statute on the receipts themselves, either in form or fact. They constitute, as said above, simply the means of ascertaining the value of the privilege conferred.' (Maine v. Grand Trunk Railway Co., 142 U. S., 228.)

"The authority of the great tribunal which rendered the judgment cited, as well as the reasoning contained in the language quoted, would seem conclusive on the question under consideration.

"But counsel for complainants have expended much research and consumed much time in argument to establish the proposition that there is a distinction between the facts in the case cited and the facts of the case a bar, and that the rule established by former decisions of the Supreme Court of the United Statts is against the validity of the Texas statute.

"Without attempting a review of all the cases decided by the Supreme Court of the United States which have a bearing on the question at issue, I will, because of the conflicting views disclosed by counsel in the argument of this case, state briefly what I understand to have been decided by each of the three reported cases from that court, which are relied on by one party or the other to this litigation, as being directly in point, and as announcing the rule which must prevail in the rendition of this judgment.

"The case reported under the title of 'State Tax on Railway Gross Receipts,' 15 Wallace, p. 284, *et seq.*, involved the validity of a statute of the State of Pennsylvania which imposed a tax upon railways engaged in transporting local, interstate and foreign commerce. By its terms, this statute imposed the tax directly on the gross receipts of the railways. But the Supreme Court of the United States, construing the provisions of the statute as a whole, held that it in fact imposed an occupation or privilege tax on the privilege of the railways to do business in the State of Pennsylvania, and not a direct tax on their gross receipts. After so construing the statute, the court affirmed its validity, as against the contention that it infringed the exclusive power of Congress to regulate interstate and foreign commerce. The judgment in that case, as I understand it, was reached by an application of the following general principles contained in the opinion of the court, viz.:

" 'We think it may safely be asserted that the States have authority to tax the estate, real and personal, of all their corporations• including carrying companies, precisely as they may tax similar property when belonging to natural persons, and to the same extent. We think also that such taxation may be laid upon a valuation, or may be an EXCISE, and that in exacting an excise tax from their corporations, the States are *not obliged to impose a fixed sum upon the franchises or upon the value of them*, but they may demand a graduated contribution, proportioned either to the *value of the privileges granted*, or to *the extent of their exercise*, or to the results of such exercise. NO MODE OF AFFECTING THIS, AND NO FORMS OF EXPRESSION WHICH HAVE NOT A MEANING BEYOND THIS can be regarded AS VIOLATING THE CONSTITUTION.'

"With the single exception that the 'form of expression' employed in the Pennsylvania statute erroneously indicated that the tax of that State was to be levied directly on gross receipts which the State had no constitutional power to tax, while the 'form of expression' employed by the Texas statute indicates no such unlawful intention, the two statutes are substantially similar in all respects material to the question under consideration. Looking past the form to the substance of the Pennsylvania statute, the Supreme Court of the United States held it to be an excise or occupation tax on the privilege of transporting local commerce, and as such to contravene no provision of the Federal Constitution. The Texas statute, both in form and substance, imposes that character of tax and is, therefore, for a stronger reason, valid as against the same constitutional objection.

"But the judgment in the case last cited was by the opinion of the court rested on another ground, also, viz.: That the tax imposed by the Pennsylvania statute was a tax upon the fruits of interstate and foreign commerce only after they have become mingled with the general property of the carrier in the State of Pennsylvania, and for that reason subject to taxation as such other property. The correctness of this latter ground, on which the court in its opinion placed the decision of the case of State Tax on Railway Gross Receipts, has been questioned in one of its subsequent decisions. But I am not able to find that either the correctness of the judgment rendered in the case, or the

correctness of the first above mentioned reason given therefor by the court in its opinion, has ever been questioned by any of its subsequent opinions. On the contrary, some of its opinions very recently rendered expressly cite the case as authority.

"The case of Philadelphia and Southern Steamship Company v. Pennsylvania, 122 U. S., p. 326, *et seq.*, involved the constitutionality of a statute of the State of Pennsylvania which by its terms imposed a tax of eight-tenths of one per cent on the gross receipts of certain classes of carriers mentioned in the act, including steamboat companies. The suit was one instituted in the State courts by the State against a steamship company, to collect from it the tax which the State claimed it owed. The defendant pleaded that it was a steamship company 'operating seagoing steamships, engaged in the business of ocean transportation between different States of the United States and foreign countries, and that all the said steamships of the said defendant were duly enrolled and registered under the laws of the United States for the coasting or foreign trade of the United States, and that the gross receipts returned to the Auditor General, upon which a tax had been levied by the Commonwealth of Pennsylvania, were received by defendant for freight and passengers carried in said steamships on the ocean and on the navigable waters of the United States, between the State of Pennsylvania and the other States of the United States and between the United States and foreign countries, and for the charter and hire of the said steamships to other parties in such trade and business, AND THAT NO PART OF THE SAID BROSS RECEIPTS WAS RECEIVED FOR THE TRANSPORTATION OF FREIGHT AND PASSENGERS BETWEEN PLACES WITHIN THE STATE OF PENNSYLVANIA, OR FOR THE HIRE AND USE OF SAID STEAMSHIPS WITHIN THE STATE OF PENNSYLVANIA.'

"The case was submitted in the trial court on an agreement that the facts pleaded, as above stated, were true. The trial court rendered judgment in favor of the Commonwealth for the amount of the taxes claimed. The Supreme Court of Pennsylvania affirmed this judgment, thereby necessarily under the facts and authoritatively construing the statute not to be one merely imposing an occupation tax on the business of local transportation, and it was thereupon brought before the Supreme Court of the United States for review. The latter court reversed the judgment of the Supreme Court of Pennsylvania, holding in its opinion 'That the imposition of the tax in this cause was a regulation of interstate and foreign commerce, in conflict with the exclusive powers of Congress under the Constitution.' In reaching this conclusion the court found that the statute under consideration imposed the tax directly upon the gross receipts of the company; and that it could not be sustained as an occupation tax, as in the case of State Tax on Railway Gross Receipts, because the company had no occupation which it was within the power of the State of Pennsylvania to tax. To my mind, the distinction between the case reported in 15 Wallace and the case reported in 122 United States Reports is plain and material. The statute under consideration in the first mentioned case, as construed by the court, levied an excise tax or corporation tax on the busi-

ness of interstate or local transportation, while the statute under consideration in the last mentioned case, as construed, did not attempt to impose such an occupation tax, but, on the contrary, levied a tax directly on gross receipts derived wholly from interstate and foreign transportation. In the former case, the railway company had an occupation which it was within the jurisdiction of the State of Pennsylvania to tax; while in the latter case, the steamship company had no such occupation; and the statute, as construed and applied by the Supreme Court of the State which enacted it (the final authority on its proper construction), applied a direct property tax to receipts from interstate and foreign commerce, because of their character as such receipts, and not as other property in the State was taxed. Language employed in a judicial opinion must be read with reference to the facts under consideration. If the opinion delivered by the Supreme Court of the United States in the Steamship Case be so read, I think it will be found to contain nothing militating against the authority of the judgment rendered by the same court in the case of State Tax on Railroad Gross Receipts; and the circumstances that the official report of the Steamship Case in the United States reports states fully the agreed facts on which the case was decided and the construction previously given the statute by the State courts probably indicates that the court considered it important that its opinion in the case should be only read with reference to these facts.

"The case of Maine v. Grand Trunk Railway Company, reported in 142 U. S., p. 217, *et seq.*, involved the validity of a statute of the State of Maine, which by its terms imposed upon railway companies an annual excise tax for the privilege of exercising their franchises in that State. The statute provided that the amount of this tax should be graduated in conformity with a plan stated in the law, and that the amount of tax to be paid by any individual coming within the terms of the bill should be ascertained by a calculation based on its total gross receipts. The defendant was a railway doing a local, interstate and foreign transportation business, and its gross receipts included receipts from all such business. As was stated above, the Supreme Court of the United States sustained the validity of the statute. In doing so, it expressly stated in its opinion that its decision in the Steamship Case in no wise conflicted with its judgment in the case at bar; and the latter judgment has never been overruled or questioned by the court that rendered it. On the contrary, it has been often and recently cited as authority by the court.

"Counsel for complainants in this case suggest but two distinctions between the Maine statute, the validity of which was affirmed by the judgment last cited, and the Texas statute. They say, if I correctly understand their argument, that the Maine statute expressly made the tax which it imposed a tax in lieu of all other taxes; while the Texas statute imposed the tax mentioned in it in addition to other taxes. It is said that the State, having the power to tax property within its limits, can, in lieu of the exercise of such power, validly impose an excise or occupation tax on the owner of such property, so long as the tax thus imposed does not amount to more than would the property tax

for which it was substituted. Other counsel urge that the tax imposed by the Maine statute was not an excise or occupation tax at all; but an *ad valorem* tax on franchises that the State had the undoubted constitutional power to tax.

"One answer to these contentions of counsel is, that the Supreme Court of the United States, in its opinion delivered in the case above cited involving the validity of the Maine statute, clearly stated its reasons for the decisions, and that the reasons so stated are not the reasons advanced by counsel; but, on the contrary, are reasons which apply equally to and affirm the validity of the Texas statute. The language above quoted from the Maine case is regarded as justifying this statement; and it is thought unnecessary to here repeat that language, or to quote further from the opinion.

"Another answer to the same proposition of counsel is, that the facts of the Maine Case, as reported, do not show that the distinctions urged by them in truth existed.

"It is true that the Maine statute did provide that the tax which it imposed should be in lieu of all other taxes. But the record is silent as to whether the tax calculated on the basis of the new law would be greater or less in amount upon complainant than it would have been under the old laws. The defendant charged that the new law was violative of the Constitution of the United States, because it attempted to impose a tax on receipts derived from interstate and foreign commerce. The State of Maine replied that the law did not do this, but merely imposed on the defendant an excise tax for the privilege of doing local business within its territorial limits. The Supreme Court of the United States sustained the law and gave as its reason for so doing the same reply that the State had given. If it had been of opinion that the new law did on its face attempt to impose an unconstitutional tax upon the defendant, it could not, under the facts of the case, have rendered the judgment that it did render, for the fact that the tax claimed under the new law would amount to less than the taxes under the old law (if such were the facts), nowhere appears as in the case.

"The proposition that the tax imposed by the Maine statute was an *ad valorem* tax imposed on the franchise of the defendant, and not an excise or occupation tax on its business, is answered by the terms of the act itself, and by the opinion above cited affirming its validity. Section 2 of the Act provides, 'That every corporation, person or association, operating any railroad in this State shall pay to the State Treasurer for the use of the State, AN ANNUAL EXCISE TAX FOR THE PRIVILEGE OF EXERCISING ITS FRANCHISES in this State.' * * * The court, in the case under consideration, defined the term 'excise tax' as used in the statute, as follows, viz.: 'The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation, for the privilege of exercising its franchises within the State of Maine. It is so declared by the statute which imposes it; and that a tax of this character is within the power of the State to levy, there can be no question. The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue

certain callings, or to deal in certain commodities, or to exercise particular franchises. It is used more frequently in this country, in the latter sense, than in the other.'

"I consider that these authorities establish the proposition that the States have power, in the absence of local constitutional limitation, to impose occupation taxes on carriers for the privilege of engaging in the business of intrastate, or local transportation; and the fact that a carrier so sought to be taxed is also engaged in the transportation of interstate or foreign commerce or in both, and the further fact that the amount of such local occupation tax is by the statute left to be determined from a calculation based on its gross earnings, including earnings derived from the transportation through the State or of interstate or foreign commerce or from both sources, constitute no obstacle to the validity of such legislation.

"4. It remains to determine whether the Texas statute under consideration violates any limitation upon the power of the Legislature, contained in the State Constitution.

"The State Constitution expressly affirms the power of the Legislature to levy occupation taxes by the use of the following language contained in Section 1 of Article 8, viz.: 'It may also impose occupation taxes both upon natural persons and upon corporations other than municipal, doing business in this State.' In Section 2 of the same article, a limitation is placed upon the power to levy occupation taxes, by the following provisions, viz.: 'All occupation taxes shall be equal and uniform upon the same class of subjects, within the limits of the the authority levying the tax.'

"It will be seen from these provisions that the Legislature is left with the power and discretion to determine for itself what classes of occupation shall be taxed and the rate of taxation which shall be imposed on the classes which it decides to tax, but is denied the power to tax individuals of the same class at different rates. In construing this limitation it has long since become the settled law of this State that the provision requiring equality and uniformity in the imposition of occupation taxes does not require that each individual embraced in the class taxed shall be required to pay to the State the same amount of money for the privilege of pursuing his occupation for a given period of time. The Legislature has the conceded power to fix the amount of such tax which will be required of different individuals in the same class by reference to the amount of business which they do.

"But it has not the power to so arbitrarily or capriciously create classes for the purpose of imposing occupation taxes that the requirement of equality and uniformity of burden upon individuals of the class to be taxed will be defeated. In other words, the Legislature, in defining the class to be taxed, must so designate it that each individual whose occupation is essentially of such character as to bring him within the class selected, will be included within the definition. Otherwise, the requirement of equality and uniformity of taxation upon individuals of the class selected would be indirectly defeated.

"The Supreme Court of the State has thus stated the rule on this subject, viz.: 'The Legislature may classify subjects of taxation, and

these classifications may and they will, be more or less arbitrary; but when the classification is made, all must be subjected to the payment of the tax imposed, who, by the existence of the facts on which the classification is based, fall within it. * * *' (Pullman Palace Car Company v. State, 64 Texas, 279.)

"The following language, quoted from the opinion in the same case, clearly shows the power of the Legislature to create classes for the purpose of imposing occupation taxes, and the limitations upon that power, viz.:

" 'Many of these classes, however, are distinguished by the fact that the occupations themselves are entirely different and distinct in character; and, in reference to such, no question of classification can arise.

" 'There are, however, some occupations taxed, which are very kindred in the elements which make them up, i. e., the acts and things which constitute the occupation taxed.

" 'The person who sells liquors of given kinds, in quantities less than a quart, is held to follow an occupation separate and distinct from that followed by a person who sells the same kinds of liquors in quantities of a quart or more, and upon each of these occupations a tax is imposed, but they differ in amount.

" 'Merchants are taxed upon their occupations, but are classed in accordance with the amount of business presumed to be done by them, evidenced by the extent of their annual purchases; but while the occupation of any of these classes involves the act of buying and selling, the extent of the former act determines the class to which the merchant belongs.

" 'Bankers, money brokers, operators of photograph or other like galleries, auctioneers, cotton brokers and factors and bill brokers and some others, are compelled to pay an occupation tax, and for this purpose are classed in accordance with the population of the place in which they do business. In all those cases, PLACE, connected with and determined by population in which the business is carried on, is an element in the determination of the class of occupation to which each one belongs.'

"In the statute which complainants attack, the occupation sought to be taxed is that of transportaing passengers, freight or baggage, or either, by railroad. The character of the means by which the transportation is effected is the distinguishing feature of the class designated. Transportation by boats or wagons are kindred occupations, but I think that it can not be properly said that they constitute essentially the same occupation as the business of railroad transportation. The State Constitution, as well as many of our statutes, classifies railroads as distinct from other common carriers. Their powers and privileges are essentially different. The extent to which their operation interferes with private rights and public convenience is different. The expense to the State of regulating their rates and exercising police supervision over them, and for them, is different. The Legislature had the power to consider all these things in creating them into a distinct class for the purpose of occupation taxation; and there is no power in the courts to nullify its action in so doing. (Northern Pacific Ry. Co. v. Walker, 47 Fed. Rep., 696.)

"5. Having decided that the tax sought to be imposed by the statute under consideration is an occupation tax on the business of complainant to transport passengers, baggage and freight within the State, and that, so construed, it violates no provision of the State or Federal Constitution above discussed, it follows that the prayer of complainant for a writ of injunction restraining defendants from proceeding to assess and collect any part of the tax provided for by the statute must be denied.

"6. No tender of taxes in any amount having been made by complainants, they are not entitled to a writ of injunction restraining defendants from proceeding to assess and collect any part of the tax provided for in the statute; for, if it be conceded that the statute is unconstitutional and void as a retroactive law, in so far as it attempts to impose upon complainants taxes for that portion of the year 1905 embraced between the 31st day of December, 1904, and the 17th day of July, 1905; or if it be conceded that the statute, when properly construed does not require the payment of the tax for that period of time, and that for either of these reasons defendants are demanding of complainants more taxes than they have a right to demand, complainants are still not entitled to the relief asked for in their alternative prayer, unless they tender and pay into court the amount of the tax which they really owe.

"The Texas & Pacific Railway Company is sole complainant in the above styled and numbered cause. In other causes pending in this court involving the same questions there are plural complainants, and substantially similar conclusions have been written applicable to all such cases. Hence the use of the word 'complainants' in this cause. As used herein, it means the Texas & Pacific Railway Company only.

"7. The complainant Texas & Pacific Railway Company is chartered by the Federal government. Its counsel ably and forcibly insist that it is exempt from the operation of the statute under consideration on this account. The argument is, that, being an agency of the Federal government, its occupation to perform its charter functions can not, under the authority of the case of McCullough v. Maryland, 4 Wheat., 316, be taxed by the State.

"The soundness of the proposition advanced is not doubted; but is it applicable to the facts of the case?

"The complainant has come into Texas, and is doing in this State a strictly local or intrastate transportation business in addition to those things which Congress has power or jurisdiction to authorize it to do. The Supreme Court of the United States has itself decided, in a case to which the complainant was a party, that the power to regulate rates for the doing of this local business of the complainant is vested in the State Legislature.

"The tax here sought to be imposed is upon the occupation of complainant in performing a business which it does by consent of the State, and which the State has the admitted right to regulate. The tax imposed by the statute is levied upon this local occupation, and not upon the performance by complainant of any of the functions which Congress has jurisdiction to authorize it to perform. It is not sought to impose a tax upon the complainant because of its being a Federal agency, but

because, in addition to performing the duties of that function, complainant is doing another and local business, which is taxable under the general law of the State applicable to all persons so engaged, whether such persons be corporations, unincorporated associations, or individuals, and whether they be incorporated under the Federal or local laws. For these reasons I think that complainant is not exempt from the operation of the statute. "V. L. BROOKS, Judge."

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY *v.* STATE OF TEXAS.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 207. Argued April 21, 22, 1908.—Decided May 18, 1908.

The statute of Texas of April 17, 1905, c. 141, imposing a tax upon railroad companies equal to one per cent of their gross receipts is, as to those companies whose receipts include receipts from interstate business, a burden on interstate commerce and as such violative of the commerce clause of the Federal Constitution. *Philadelphia & Southern Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326 followed; *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217, distinguished, and held that the latter case did not overrule the former.

Neither the state courts nor the legislatures, by giving a tax a particular name, or by the use of some form of words, can take away the duty of this court to consider the nature and effect of a tax, and if it bears upon in-

terstate commerce so directly as to amount to a regulation it cannot be saved by name or form.
97 S. W. Rep. 71, reversed.

THE facts are stated in the opinion.

Mr. Maxwell Evarts and *Mr. Hiram M. Garwood*, with whom *Mr. Robert S. Lovett* was on the brief, for plaintiffs in error:

The tax to be levied directly upon the receipts from interstate and foreign transportation is a regulation of interstate and foreign commerce, contrary to the commerce clause of the Federal Constitution.

It cannot avail that the tax is arbitrarily declared an occupation tax. Constitutional limitations cannot be broken down or circumvented by the form in which a thing is done or attempted. The judiciary will look through the form to the substance and will invalidate any legislative act which in its substance is a breach of constitutional right.

To tax the occupation of an importer is to tax the import. *Brown* v. *Maryland*, 12 Wheat. 419. To tax the income of United States securities is to tax the securities themselves. *Western* v. *Charleston*, 2 Pet. 449. To tax an income from an official position is to tax the office itself. *Dobbins* v. *Erie County Commissioners*, 16 Pet. 435. To tax a bill of lading is to tax the thing transported and the receipts therefrom. *Almy* v. *California*, 24 How. 169. A tax upon interest is a tax upon the bond. *Railroad Co.* v. *Jackson*, 7 Wall. 262. A tax upon the auctioneer is a tax upon the goods sold. *Cook* v. *Pennsylvania*, 97 U. S. 566. To tax the income of personal property and the rental of lands is to tax the property from which the income is derived. *Pollock* v. *Farmers' Trust Co.*, 157 U. S. 429. To compel the carrier to give information relative to an interstate transit is to burden and regulate interstate commerce. *Central of Georgia Ry. Co.* v. *Murphey*, 196 U. S. 194. In like manner to tax the receipts from interstate commerce is to regulate that commerce itself. While at an early stage of the decisions of this court it was thought that

the power of Congress to regulate commerce among the States was concurrent with that of the State, it has become universally accepted doctrine that the power of Congress to regulate commerce among the States is exclusive. *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Pickard* v. *Pullman Co.*, 117 U. S. 34; *Fargo* v. *Michigan*, 121 U. S. 230; *W. U. Tel. Co.* v. *Pennsylvania*, 128 U. S. 39; *Ratterman* v. *W. U. Tel. Co.*, 127 U. S. 411; *Western Union Tel. Co.* v. *Alabama*, 132 U. S. 472; *Postal Tel. Co.* v. *Adams*, 155 U. S. 698.

It is contended that the *Steamship case* is not strictly applicable because in that case all of the receipts were interstate and foreign, while here, part of the receipts are domestic. This variance in the facts does not affect the principle or the result as a tax on interstate receipts cannot be sustained because the same tax is levied at the same time upon state receipts. *State Freight Tax Case*, 15 Wallace, 232; *W. U. Tel. Co.* v. *Texas*, 105 U. S. 460; *Pickard* v. *Pullman Co.*, 117 U. S. 34; *W. U. Tel. Co.* v. *Alabama*, 132 U. S. 477; *Allen* v. *Pullman Co.*, 191 U. S. 171; *Leloup* v. *Mobile*, 127 U. S. 648; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Brenan* v. *Titusville*, 153 U. S. 289; *Asher* v. *Texas*, 128 U. S. 132; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Norfolk & Western Ry. Co.* v. *Sims*, 191 U. S. 441; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Stockard* v. *Morgan*, 185 U. S. 37.

If it should be held, however, that the tax here involved is an occupation tax, there remain four propositions, three of which at least must be decided against the contention of plaintiffs in error before this tax can be sustained.

1. An occupation, license, or privilege tax cannot be laid on the occupation or business of engaging in interstate commerce, although at the same time such a tax be laid on the same party engaged in intrastate commerce.

2. Assuming that the tax is imposed only on the intrastate occupation, the same is invalid, because:

The State in levying a tax on a state occupation cannot base

the same in whole or in part on the earnings of an interstate occupation, as the State cannot, in arriving at the amount of the tax, take as a basis those things which the State has no power to tax, for this would accomplish indirectly what the State may not do directly.

The assessment of the tax at a sum equal to one per cent of the gross interstate earnings in effect is an impediment and serious obstruction to, and therefore a burden upon interstate commerce, as the carrier, in fixing his interstate rate, will necessarily consider that from the earnings of every pound carried, he must give to the State one per cent. If it be admitted that the State can so demand one per cent, it may demand any larger percentage, and under this form of taxation the State may without practical limit, regulate the interstate commerce even to the extent of suppressing the same.

3. Though a tax be levied on the state occupation, where the burden of the same will necessarily fall on the interstate occupation and the party is not at liberty to decline the state occupation, such a tax cannot stand.

4. The tax is laid on both the occupation of doing a state and interstate business. There is no room left for construction upon this proposition. *Steamship Co.* v. *Port Wardens*, 6 Wall. 31; *Welton* v. *Missouri*, 91 U. S. 281; *Steamship Co.* v. *Pennsylvania*, 122 U. S. 346; *Stockard* v. *Morgan*, 185 U. S. 27, 37; *Robbins* v. *Shelby Taxing District*, 120 U. S. 496; *Corson* v. *Maryland*, 120 U. S. 502; *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411; *L. & N. R. R. Co.* v. *Eubank*, 184 U. S. 27; *Wabash Ry. Co.* v. *Illinois*, 118 U. S. 557. Cases cited by defendant in error, viz., *Gross Receipts Tax Case*, 18 Wall. 206; *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, discussed and distinguished.

Mr. Robert Vance Davidson, Attorney General of the State of Texas, and *Mr. William Edward Hawkins*, for defendant in error:

The tax prescribed by chap. 141 of the acts of the twenty-

ninth legislature of Texas is an occupation tax. *Maine* v. *Grand Trunk Railway*, 142 U. S. 217; *State Railroad Tax Cases*, 92 U. S. 603; *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Osborne* v. *Mobile*, 16 Wall. 479; *Nathan* v. *Louisiana*, 8 How. 73; Constitution of Texas, Art. 8, §§ 1, 2, 9 and 17; *State of Texas* v. *G., H. & S. A. Ry. Co.*, 97 S. W. Rep. 71; *Albrecht* v. *State*, 8 Texas App. 217; *Languille* v. *State*, 4 Texas App. 322, and cases cited; *State* v. *Stevens*, 4 Texas, 137; *Aulanier* v. *Governor*, 1 Texas, 664; *State* v. *Bock*, 9 Texas, 369; *Thompson* v. *State*, 17 Texas App. 258; *Texas Banking and Ins. Co.* v. *State*, 42 Texas, 637; *Galveston County* v. *Gorham*, 49 Texas, 289; *Blessing* v. *Galveston*, 42 Texas, 660; *Fahey* v. *State*, 27 Texas App. 161; *Higgins* v. *Rinker*, 47 Texas, 396; *Pullman Co.* v. *State*, 64 Texas, 274; *Cumberland R. R. Co.* v. *State*, 52 L. R. A. 756; *Capital City Water Co.* v. *Board of Revenue*, 107 Alabama, 303; Cooley on Taxation (3d ed.), 1094 *et seq.*

An occupation tax is peculiar in its character. It is not a tax upon property, but upon the pursuit which a man follows in order to acquire property. *Appeal of Bangor*, 109 Pa. St. 89.

A franchise is a particular privilege conferred by law, emanating from the sovereign power and vested in individuals, or a corporation. Webster's International Dictionary; 3 Words and Phrases, pp. 2929–2937.

A franchise to be a corporation is distinct from a franchise acquired and exercised by a corporation, to own, maintain and operate a railway. *People* v. *Commissioners*, 174 N. Y. 417.

Individuals, whether alone or when associated with others, have an inherent right to pursue some lawful occupation, subject, however, to such taxes as the State may impose. But a corporation is wholly a creature of the law in so far as its right to exist is concerned. Such right of a mere existence is a primary franchise, vesting, as we have seen, in the individuals who organize the corporation.

To the corporate entity so created the State grants the right

which the individual, or the association of individuals, inherently enjoy; viz., the right to do business within the State, or, in other words, to pursue a given occupation. *Memphis & Little Rock R. R. Co.* v. *Commissioners*, 112 U. S. 609; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 313; *People* v. *State Board*, 174 N. Y. 417; *Iron Silver Mining Co.* v. *Cowie*, 31 Colorado, 450; 3 Words and Phrases, 2929–2937.

The legislature of Texas has a perfect right to require those owning, operating, managing or controlling a railroad lying in whole or in part, within this State, to pay, not only an *ad valorem* tax, but also a tax for the privilege of the continued exercise of their franchises to do business within this State.

The mileage basis of apportionment, as applied by the Texas statute to the gross receipts of lines of railroad lying partly within and partly without the State of Texas, is constitutional, valid and fair, and correctly and justly determines what proportion of the entire receipts of such line of railroad results from business done within the State of Texas. *Michigan Central Ry. Co.* v. *Powers*, 201 U. S. 288; *Adams Express Co.* v. *Kentucky*, 166 U. S. 171, 180; *W. U. Tel. Co.* v. *Taggart*, 163 U. S. 1; *W. U. Tel. Co.* v. *Massachusetts*, 125 U. S. 552; *Cleveland &c. Ry. Co.* v. *Backus*, 154 U. S. 439; *Central Pacific Ry. Co.* v. *California*, 162 U. S. 91; *Maine* v. *Grand Trunk Ry.*, 142 U. S. 217; *Pittsburg &c. Ry. Co.* v. *Backus*, 154 U. S. 421; Cooley on Taxation (3d ed.), 163, 164.

A statute may affect interstate commerce without amounting to a regulation thereof. *McLean* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 50; *Ficklen* v. *Shelby Co.*, 145 U. S. 21; *Ouichita Packet Co.* v. *Aiken*, 121 U. S. 444; *State Tax on Railway Gross Receipts*, 15 Wall. 293; *Sherlock* v. *Alling*, 93 U. S. 99; *Smith* v. *Alabama*, 124 U. S. 465; *Western Union Tel. Co.* v. *James*, 162 U. S. 656.

The tax prescribed is not, in substance or effect, a tax, or a burden upon, or a regulation of interstate commerce. It is not upon articles of or receipts from interstate commerce, and such receipts are immaterial except in so far as they enter into

and become a part of the measure by which the amount of the tax is determined. *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 387; *Delaware Ry. Tax Case*, 18 Wall. 206; *Erie Ry. Co.* v. *Pennslyvania*, 21 Wall. 492; *New York, Lake Erie & Western Ry. Co.* v. *Pennsylvania*, 158 U. S. 431; *McHenry* v. *Alford*, 168 U. S. 651; *State Railroad Tax Cases*, 92 U. S. 575; *Nathan* v. *Louisiana*, 8 How. 73; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Western Union Tel. Co.* v. *Taggart*, 163 U. S. 1; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 315; *New York State* v. *Roberts*, 171 U. S. 664, and cases cited; *Pacific Express Co.* v. *Siebert*, 142 U. S. 350; *Lacy* v. *Packing Co.*, 200 U. S. 226; *Cumberland Railroad Co.* v. *State*, 52 L. R. A. 764.

The tax here levied is not "on" gross receipts, but "equal to" a given percentage "calculated on the gross receipts."

Lord Eldon held: Where the salesman has an amount of money equal to one-tenth of the profits this gives him no action of account, and, therefore, he is not a partner; but where he is to receive one-tenth of the profits, this gives him an action of account, and, therefore, makes him a partner. Parsons on Contracts (8th ed.), 160, citing Lord Eldon.

The word "equal," as used in the statute, means "having the same magnitude, the same value." Webster's International Dictionary.

"Equal" implies, not identity, but duality; the use of one thing as the measure of another. It is so understood in the plain language of the people. *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 59 Fed. Rep. 400; *Kentucky & I. Bridge Co.* v. *Louisville & N. R. R. Co.*, 37 Fed. Rep. 624; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 63 Fed. Rep. 775.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action against certain railroads to recover taxes and penalties. The Supreme Court of the State held the penal-

ties to be void under the state constitution, but upheld the tax. 97 S. W. Rep. 71. The railroads bring the case here mainly on the ground that the law upon which the action is based is an attempt to regulate commerce among the States.

The act in question is entitled "An Act imposing a tax upon railroad corporations . . . and other persons . . . owning . . . or controlling any line of railroad in this State . . . equal to one per cent. of their gross receipts . . . and repealing the existing tax on the gross passenger earnings of railroads." It proceeds in § 1 to impose upon such railroads "an annual tax for the year 1905, and for each calendar year thereafter, equal to one per centum of its gross receipts, if such line of railroad lies wholly within the State." In § 2 a report, under oath, of "the gross receipts of such line of railroad, from every source whatever, for the year ending on the thirtieth day of June last preceding," and immediate payment of the tax "calculated on the gross receipts so reported," are required. The comptroller is given power to call for other reports, and is to "estimate such tax on the true gross receipts thereby disclosed," etc. The lines of the railroads concerned are wholly within the State, but they connect with other lines, and a part, in some instances much the larger part, of their gross receipts is derived from the carriage of passengers and freight coming from, or destined to, points without the State. In view of this portion of their business, the railroads contend that the case is governed by *Philadelphia & Southern Mail Steamship Co.* v. *Pennsylvania*, 122 U. S. 326. The counsel for the State rely upon *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, and maintain, if necessary, that the later overrules the earlier case.

In *Philadelphia & Southern Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, it was decided that a tax upon the gross receipts of a steamship corporation of the State, when such receipts were derived from commerce between the States and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law. It cites

the earlier cases to the same effect. Later ones are *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411; *Western Union Telegraph Co.* v. *Pennsylvania*, 128 U. S. 39; *Western Union Telegraph Co.* v. *Seay*, 132 U. S. 472. See also *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 25; *Ficklen* v. *Taxing District of Shelby County*, 145 U. S. 1, 22; *New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania*, 158 U. S. 431, 438; *McHenry* v. *Alford*, 168 U. S. 651, 670, 671; *Atlantic & Pacific Telegraph Co.* v. *Philadelphia*, 190 U. S. 160, 162. In *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, the authority of the *Philadelphia Steamship Company case* was accepted without question, and the decision was justified by the majority as not in any way qualifying or impairing it. The validity of the distinction was what divided the court.

It being once admitted, as of course it must be, that not every law that affects commerce among the States is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines. As the property of companies engaged in such commerce may be taxed, *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, and may be taxed at its value as it is, in its organic relations, and not merely as a congeries of unrelated items, taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged. *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194; *S. C.*, 166 U. S. 171; *Fargo* v. *Hart*, 193 U. S. 490, 499. So it has been held that a tax on the property and business of a railroad operated within the State might be estimated *prima facie* by gross income, computed by adding to the income derived from business within the State the proportion of interstate business equal to the proportion between the road over which the business was carried within the State to the total length of the road over which it was carried. *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379.

Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately, at least in the long run, come out of income, obviously taxes called taxes on property and those called taxes on income or receipts tend to run into each other somewhat as fair value and anticipated profits run into each other in the law of damages. The difficulty of distinguishing them became greater when it was decided, not without much debate and difference of opinion, that interstate carriers' property might be taxed as a going concern. In *Wisconsin & Michigan Ry. Co.* v. *Powers, supra*, the measure of property by income purported only to be *prima facie* valid. But the extreme case came earlier. In *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, "an annual excise tax for the privilege of exercising its franchise," was levied upon every one operating a railroad in the State, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile multiplied by the number of miles within the State when the road extended outside. This seems at first sight like a reaction from the *Philadelphia & Southern Mail Steamship Company case*. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the State was to reach that value and not to fasten on the receipts from transportation as such was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax. See *Ficklen* v. *Taxing District of Shelby County*, 145 U. S. 1, 23; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 697; *McHenry* v. *Alford*, 168 U. S. 651, 670, 671.

"By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution." *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 697. See *New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania*, 158 U. S. 431, 438, 439. The question is whether this is such a tax. It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. *Stockard* v. *Morgan*, 185 U. S. 27, 37; *Asbell* v. *Kansas*, 209 U. S. 251, 254, 256.

We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the States. The distinction between a tax "equal to" one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the State

that another tax on the property of the railroad is upon a valuation of that property taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words "equal to."

Of course, it does not matter that the plaintiffs in error are domestic corporations or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the State. We are of opinion that the judgment should be reversed.

Judgment reversed.

MR. JUSTICE HARLAN, with whom THE CHIEF JUSTICE, MR. JUSTICE WHITE and MR. JUSTICE MCKENNA concurred, dissenting.

In my opinion the court ought to accept the interpretation which the Supreme Court of Texas places upon the statute in question. In other words, it should be assumed that, by imposing upon railroads and corporations owning, operating, managing or controlling any line of railroad in the State, for the transportation of passengers, freight or baggage, an annual tax "*equal* to one per centum of its gross receipts if such line of railroad lies wholly within the State, and if such line of railroad lies partly within and partly without the State, it shall pay a tax *equal* to such proportion of the said one per centum of its gross receipts as the length of the portion of such line within the State bears to the whole length of such line," the State intended to impose only an occupation tax. Such is the construction which the state court places on the statute and that construction is justified by the words used. We have the authority of the Supreme Court of Texas for saying that the constitution of that State authorizes the imposition of occupation taxes upon natural persons and upon corporations, other than municipal, doing business in that State. The plaintiff in error is a Texas corporation, and it cannot be doubted that the State may impose an occupation tax on one of its own corporations,

210 U. S. HARLAN, J., FULLER, CH. J., WHITE and MCKENNA, JJ., dissenting.

provided such tax does not interfere with the exercise of some power belonging to the United States.

But it is said that the tax in question, even if regarded as an occupation tax, is invalid, as constituting a direct burden on interstate commerce, the regulation of which belongs to Congress. It is not, in my opinion, to be taken as a tax on interstate commerce in the sense of the Constitution; for its operation on interstate commerce is only incidental, not direct. A State, in the regulation of its internal affairs, often prescribes rules which in their operation, remotely or incidentally, affect interstate commerce. But such rules have never been held as in themselves imposing direct burdens upon such commerce, and on that ground invalid. The State in the present case ascertains the extent of business done by the corporation in the State, and requires an annual occupation tax "equal" to a named per centum of the amount of such business. It does not lay any tax directly upon the gross receipts as such, as was the case in *Philadelphia & Southern Mail Steamship Co.* v. *Pennsylvania*, 122 U. S. 326. In that case the court said: "The tax was levied directly upon the receipts derived by the company from its fares and freights, for the transportation of persons and goods between different States, and between the States and foreign countries, and from the charter of its vessels, which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. Here there is no levying upon receipts as such from interstate commerce. The State only measures the occupation tax by looking at the entire amount of the business done within its limits without reference to the source from which the business comes. It does not tax any part of the business because of its being interstate. It has reference equally to all kinds of business done by the corporation in the State. Suppose the State as, under its constitution it might do, should impose an income tax upon railroad corporations of its own creation, doing business within the State, equal to a given per cent of all income received by the corporation from its business, would

the corporation be entitled to have excluded from computation such of its income as was derived from interstate commerce? Such would be its right under the principles announced in the present case. In the case supposed the income tax would, under the principles or rules now announced, be regarded as a direct burden upon interstate commerce. I cannot assent to this view.

If it did not delay an announcement of the court's decision longer, perhaps, than is desirable, I should be glad to go into this subject at large and present such a review of the adjudged cases as would show that the views expressed by me are in harmony with previous cases in this court. The present decision, I fear, will seriously affect the taxing laws of many States, and so impair the powers of the several States, in matters of taxation, that they cannot compel its own corporations to bear their just proportion of such public burdens as can be met only by taxation. I dissent from the opinion and judgment of the court.

MR. CHIEF JUSTICE FULLER, MR. JUSTICE WHITE and MR. JUSTICE MCKENNA concur in this dissent.